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## Board of Education of Kiryas Joel Village School District v. Grunet: The Supreme Court Shall Make No Law Defining an Establishment of Religion

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***Board of Education of Kiryas Joel Village  
School District v. Grumet:***  
**The Supreme Court Shall Make No Law  
Defining an Establishment of Religion**

"This area of constitutional law is an example of chaos theory."<sup>1</sup>

I. INTRODUCTION

In *Board of Education of Kiryas Joel Village School District v. Grumet*,<sup>2</sup> the United States Supreme Court, in a six to three plurality decision, held that a New York statute which created a public school district contiguous with the boundaries of the Village of Kiryas Joel and inhabited exclusively by members of the Satmar Hasidic sect of Judaism violated the Establishment Clause.<sup>3</sup> The disabled children who lived in the Village of Kiryas Joel suffered "panic, fear and trauma" upon encountering non-Satmars, whose style of dress and behavior were extremely different from their own, when they left the Village of Kiryas Joel to attend public schools.<sup>4</sup> The Satmar children went to the public schools to obtain the special education services to which they were entitled under state and federal law.<sup>5</sup> In order to relieve the children of this trauma, the New York legislature created the Kiryas Joel Village School District which operated a public school within the Village of Kiryas Joel.<sup>6</sup> This public school provided special education services to the disabled Satmar children.<sup>7</sup> The Court, however, invalidated the statute because it created a "'fusion' of governmental and religious functions" and did not guaran-

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1. Thomas E. Baker, *Creating a Public School District for an Insular Religious Community: Has the State Gone Too Far or Just Far Enough?*, 6 PREVIEW OF UNITED STATES SUPREME COURT CASES, 1993-94 TERM, 248, 249 (March 18, 1994) (citing Glenn H. Reynolds, *Chaos and the Court*, 91 COLUM. L. REV. 110 (1991) (referring to the U.S. Supreme Court's Establishment Clause decisions)).

2. 114 S. Ct. 2481 (1994).

3. *Id.* at 2494. The First Amendment provides in part that "Congress shall make no law respecting an establishment of religion." U.S. CONST. amend. I.

4. *Grumet*, 114 S. Ct. at 2485; see *infra* notes 152-68 and accompanying text (describing the Satmar culture).

5. *Grumet*, 114 S. Ct. at 2485.

6. *Id.* at 2485-86.

7. *Id.* at 2486.

tee that other groups would receive the same treatment.<sup>8</sup> For the Court, the statute represented an unconstitutional method of providing the disabled Satmar children with the state and federal special education services to which they were entitled by law.<sup>9</sup>

*Grumet* represents, at first glance, an inscrutable addition to an already inscrutable area of constitutional jurisprudence—the Establishment Clause.<sup>10</sup> Since 1971, the Court has judged Establishment Clause issues against no less than five tests and offered scant guidance as to which test may apply in any given case.<sup>11</sup> The six opinions issued in *Grumet*, none of which gained the support of a majority of Justices, proliferated this chaotic tradition.<sup>12</sup>

Like other recent Establishment Clause decisions, the highly splintered *Grumet* opinions did not produce a single test or rationale that commanded the support of a majority of Justices or upon which the Court is likely to agree and apply in future cases.<sup>13</sup> However, close examination of the opinions reveals useful indicators of where the Justices' Establishment Clause viewpoints fall.<sup>14</sup> Within their *Grumet* opinions, the Justices redefined old and created new tests against which to evaluate Establishment Clause cases.<sup>15</sup> The Justices' outcomes also remained consistent

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8. *Id.* at 2488.

9. *Id.* at 2485-88.

10. "Supreme Court commentators have been virtually unanimous in their censure of the Justices' reasoning in religion clause cases: the Court's decisionmaking in this area has been portrayed as 'bizarre,' 'fatuous,' 'a hodgepodge derived from Alice's Adventures in Wonderland.'" Ronald F. Thiemann, *Beyond the Separation of Church and State: Public Religion and Constitutional Values*, 66 N.Y. St. B.J. 48, 48 (1994).

11. In 1973, the Court promulgated the *Lemon* test, *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971), and since then has formulated numerous other tests. See *infra* notes 315-83 and accompanying text. "It is difficult to identify a consistent or coherent pattern of reasoning in the Court's treatment of religion . . ." Thiemann, *supra* note 10, at 48. "Over the past decade, the area of Establishment Clause jurisprudence has been clouded by a veil of change and uncertainty. Tests used by the Court have been revised, re-examined, and even ignored." Craig L. Olivo, Note, *Grumet v. Board of Education of the Kiryas Joel Village School District: When Neutrality Masks Hostility—The Exclusion of Religious Communities From An Entitlement to Public Schools*, 68 NOTRE DAME L. REV. 775, 813 (1993).

12. Justice Souter wrote the plurality opinion, which was joined by Justices Blackmun and Stevens in full and Justices O'Connor and Ginsburg in part. *Grumet*, 114 S. Ct. at 2484. Justice Stevens wrote a concurrence in which Justices Blackmun and Ginsburg joined. *Id.* at 2495 (Stevens, J., concurring). Justices Blackmun, O'Connor, and Kennedy wrote concurring opinions in which no other justices joined. *Id.* at 2493 (Blackmun, J., concurring), 2495 (O'Connor, J., concurring), 2501 (Kennedy, J., concurring). Justice Scalia wrote a dissenting opinion in which Chief Justice Rehnquist and Justice Thomas joined. *Id.* at 2505 (Scalia, J., dissenting).

13. See *infra* notes 203-311 and accompanying text.

14. See *infra* notes 203-311 and accompanying text.

15. See *infra* notes 315-99 and accompanying text.

with their previous decisions within a few specific areas of Establishment Clause precedent.<sup>16</sup> Furthermore, a majority of Justices called for the reexamination of a landmark Establishment Clause decision.<sup>17</sup> These doctrinal shifts will certainly impact future Establishment Clause decisions.<sup>18</sup> But, beyond its precedential effects, *Grumet* represents a significant indication as to how federal and state governments may, consistent with the Establishment Clause, provide special education services to disabled children attending private religious schools.<sup>19</sup>

In order to make sense of *Grumet* and unlock the indicators hidden within its dizzying array of Establishment Clause rhetoric, this Casenote explores the Establishment Clause precedent surrounding the issues raised in *Grumet*.<sup>20</sup> Next, after presenting *Grumet's* factual background and lower court opinions, this Casenote analyzes the six opinions handed down in *Grumet*.<sup>21</sup> The Impact section evaluates how *Grumet* redefined old and created new Establishment Clause tests, the effect *Grumet* may have on future Establishment Clause cases, and, finally, *Grumet's* indication of how the Court will reconcile the conflict between the Establishment Clause and government aid to disabled private religious school students.<sup>22</sup> The Casenote concludes by emphasizing the tremendous discontinuity in the Court's Establishment Clause doctrine and suggesting what the Court might do in the future to allow the nation to effectively and equitably deal with the conflicts that arise when its citizens confront the Establishment Clause.<sup>23</sup>

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16. See *infra* notes 416-46 and accompanying text.

17. Chief Justice Rehnquist and Justices O'Connor, Kennedy, Scalia, and Thomas stated their willingness to reconsider *Aguilar v. Felton*, 473 U.S. 402 (1985). *Grumet*, 114 S. Ct. at 2498 (O'Connor, J., concurring), 2505 (Kennedy, J., concurring), 2515 (Scalia, J., dissenting). Furthermore, four Justices, those stated minus Justice O'Connor, called for the reconsideration of *Aguilar's* companion case, *School District of the City of Grand Rapids v. Ball*, 473 U.S. 373 (1985). *Grumet*, 114 S. Ct. at 2505 (Kennedy, J., concurring), 2515 (Scalia, J., dissenting).

18. See *infra* notes 416-46 and accompanying text.

19. See *infra* notes 447-85 and accompanying text.

20. See *infra* notes 24-151 and accompanying text.

21. See *infra* notes 152-311 and accompanying text.

22. See *infra* notes 312-485 and accompanying text.

23. See *infra* notes 486-90 and accompanying text.

## II. HISTORICAL BACKGROUND

Given the lack of any clear line of cases supporting the Court's reasoning in *Board of Education of Kiryas Joel Village School District v. Grumet*,<sup>24</sup> this Casenote explores the two areas of Establishment Clause precedent most directly relevant to the Justices' varying approaches to the case. These lines of precedent do not represent a complete picture of Establishment Clause jurisprudence.<sup>25</sup> This analysis instead attempts to clarify this muddled area of law and point out the recurring themes leading to *Grumet*.

Despite its appearance as a government aid to religious schools case, *Grumet*, in the eyes of the Supreme Court, was more about the allocation of political power in support of religion than private sectarian education.<sup>26</sup> Consequently, this section first explores cases where the state in some way aided religion via direct state funding of nonpublic institutions as part of neutral aid schemes that benefit religious and nonreligious institutions alike or by removing government obstacles to the free exercise of religion.<sup>27</sup> Next, this section presents cases involving allocations of state power in support of religion.<sup>28</sup> The factual distinctions between government aid programs and the conferral of government power upon religious groups may seem slight at first, but slight distinctions are the nature of the Establishment Clause beast and are, as the Court's decisions reflect, crucial to most Establishment Clause holdings.<sup>29</sup> This his-

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24. 114 S. Ct. 2481 (1994).

25. For more complete surveys of Establishment Clause jurisprudence, see DONALD L. DRAKEMAN, *CHURCH-STATE CONSTITUTIONAL ISSUES* (1991); JOHN E. NOWAK & RONALD D. ROTUNDA, *CONSTITUTIONAL LAW* 1157-1206 (4th ed. 1991); *THE SUPREME COURT ON CHURCH AND STATE* (Robert S. Alley ed., 1988); LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1154-1301 (2d ed. 1988); Ira C. Lupu, *The Lingering Death of Separationism*, 62 GEO. WASH. L. REV. 230 (1993); Julie K. Underwood, *Changing Establishment Analysis Within and Outside the Context of Education*, 33 HOW. L.J. 53 (1990).

26. See *Grumet*, 114 S.Ct. at 2487.

27. See *infra* notes 30-121 and accompanying text.

28. See *infra* notes 122-51 and accompanying text.

29. In his dissenting opinion in *Wallace v. Jaffree*, Justice Rehnquist catalogued the seemingly indistinguishable distinctions made by the Court throughout its Establishment Clause decisions in the area of parochial education. 472 U.S. 38, 110-11 (1985) (Rehnquist, J., dissenting).

For example, a State may lend to parochial school children geography textbooks that contain maps of the United States, but the State may not lend maps of the United States for use in geography class. A State may lend textbooks on American colonial history, but it may not lend a film on George Washington, or a film projector to show it in history class.

*Id.* (Rehnquist, J., dissenting) (footnotes omitted); see also *Grumet*, 114 S. Ct. at 2499 (O'Connor, J., concurring) (noting how subtle differences in the wording of each prong

torical analysis finds the Court most willing to reject Establishment Clause challenges in cases involving neutral, generally applicable government aid programs that have the affect of benefiting religious, as well as nonreligious, institutions or citizens.

#### A. Government Aid to Religion Cases

##### 1. Direct State Funding of Non-Public Institutions

Cases addressing what the Court labels state programs that have the effect of providing direct funding to religious institutions usually result in the Court finding a violation of the Establishment Clause.<sup>30</sup> The seminal case in which the Court invalidated this kind of support is *Lemon v. Kurtzman*.<sup>31</sup>

At issue in *Lemon* was a Rhode Island statute which authorized state subsidization of the salaries of teachers who taught secular subjects in nonpublic elementary schools.<sup>32</sup> Also at issue was a similar Pennsylvania statute that effectively reimbursed nonpublic schools for teachers' salaries, textbooks, and other materials used to teach secular subjects.<sup>33</sup> Chief Justice Burger, writing for the majority, set forth what is now known as the *Lemon* test: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.'"<sup>34</sup> Applying this

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of the *Lemon* test leads to "more complicated definitions which stray ever further from their literal meaning").

30. See *infra* notes 32-67 and accompanying text.

31. 403 U.S. 602 (1971). *Lemon* and its test for Establishment Clause cases has generated, and continues to generate, an astonishing amount of commentary. See, e.g., Daniel O. Conkle, *Lemon Lives*, 43 CASE W. RES. L. REV. 865 (1993); Roald Y. Mykkeltvedt, *Souring on Lemon: The Supreme Court's Establishment Clause Doctrine in Transition*, 44 MERCER L. REV. 881 (1993); Michael S. Paulsen, *Lemon is Dead*, 43 CASE W. RES. L. REV. 795 (1993); John C. Polifka, *Use of the Lemon Test in the Review of Public School Curricular Decisions Concerning "Secular Humanism" Under the Establishment Clause*, 33 S.D. L. REV. 112 (1988); Eric J. Segall, *Parochial School Aid Revisited: The Lemon Test, The Endorsement Test and Religious Liberty*, 28 SAN DIEGO L. REV. 263 (1991); Douglas C. Shimonek, Comment, *Using the Lemon Test as Camouflage: Avoiding the Establishment Clause*, 16 WM. MITCHELL L. REV. 835 (1990).

32. *Lemon*, 403 U.S. at 606-09.

33. *Id.* at 609-10.

34. *Id.* at 612-13 (quoting *Walz v. Tax Comm'n*, 397 U.S. 664, 674 (1970)) (citations omitted). Before announcing the *Lemon* test, Justice Burger noted that: "In the absence of precisely stated constitutional prohibitions, we must draw lines with refer-

test, the Court found that both statutes violated the Establishment Clause because they failed the test's third prong.<sup>35</sup> *Lemon* signaled two important developments in Establishment Clause doctrine. First, state programs designed to aid or improve the quality of education at private sectarian schools would be subject to rigorous constitutional scrutiny and would most likely fail.<sup>36</sup> Second, and more importantly, the Court

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ence to the three main evils against which the Establishment Clause was intended to afford protection: 'sponsorship, financial support, and active involvement of the sovereign in religious activity.'" *Id.* at 612 (quoting *Walz*, 397 U.S. at 668). Thus, the *Lemon* test flowed from these policy considerations and encompassed three separate tests "gleaned" from the Court's precedents. *Id.* at 612-13.

35. The Court held that the statutes were fostered by a permissible secular legislative purpose—improvement of the quality of secular education in religious schools. *Id.* at 613. "A State always has a legitimate concern for maintaining minimum standards in all schools it allows to operate." *Id.* Thus, the statutes passed the first *Lemon* prong. *Id.* Then the Court passed over the issue of whether the statutes had the primary or principle effect of advancing religion, the second prong, because the statutes violated the third prong. *Id.* at 613-14. "[W]e conclude that the cumulative impact of the entire relationship arising under the statutes . . . involves excessive entanglement between government and religion." *Id.* at 614. Analysis of the third prong, the Court warned, did "not call for total separation between church and state; total separation is not possible in an absolute sense." *Id.* Instead, the entanglement inquiry revolved around the impermissibility of "programs, whose very nature is apt to entangle the state in details of administration." *Id.* at 615 (quoting *Walz*, 397 U.S. at 695 (Harlan, J., concurring)). Entangling programs are discovered by examining "the character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority." *Id.* Regarding the Rhode Island statute, the Court found that the nature and administration of the state's Roman Catholic elementary schools, the statute's sole beneficiaries, was permeated by religion. *Id.* at 615-20. Thus, the "comprehensive, discriminating, and continuing state surveillance" that would be required to guarantee that the subsidized teachers did not "inculcate religion" led the Court to find that the statute would cause excessive government entanglement with religion. *Id.* at 619. Similarly, the Pennsylvania statute's provision of subsidies for teachers, as well as other educational materials, in religious schools would require such extensive surveillance to ensure that the state aid flowed only to secular activities that an excessive entanglement between state and religion would result. *Id.* at 620-22.

As demonstrated by the Court's analysis, if a policy violates any of *Lemon*'s three prongs, it violates the Establishment Clause. See *Stone v. Graham*, 449 U.S. 39, 40-41 (1980).

36. "The sole question is whether state aid to these schools can be squared with the dictates of the Religion Clauses. Under our system, the choice has been made that government is to be entirely excluded from the area of religious instruction and churches excluded from the affairs of government." *Lemon*, 403 U.S. at 625; see *Aguilar v. Felton*, 473 U.S. 402, 404, 414 (1985) (holding that City aid to "educationally deprived children from low-income families" violated the Establishment Clause); *School Dist. of the City of Grand Rapids v. Ball*, 473 U.S. 373, 397 (1985) (holding that remedial education programs provided by nonpublic teachers and on nonpublic school grounds violated the Establishment Clause); *Levitt v. Committee for Pub. Educ. and Religious Liberty*, 413 U.S. 472, 482 (1973) (holding that state reimburse-

placed the *Lemon* test at the center of its Establishment Clause jurisprudence.<sup>37</sup> While at times this centerpiece would be functional, it would ultimately obstruct the ability of courts to clearly analyze Establishment Clause cases.<sup>38</sup>

Violations of *Lemon's* second prong proved fatal for the state aid schemes at issue in two "aid to sectarian school" cases.<sup>39</sup> In *Levitt v. Committee for Public Education and Religious Liberty*,<sup>40</sup> the Court found that a New York statute authorizing the state to reimburse nonpublic, including religiously affiliated, schools for the costs of administering, grading, and compiling the results of state-prepared and teacher-prepared tests violated the Establishment Clause as an "impermissible aid to religion."<sup>41</sup> In *Committee for Public Education and Reli-*

ment for administering, grading, and compiling the results of standardized tests by nonpublic schools violated the Establishment Clause); *Committee for Pub. Educ. and Religious Liberty v. Nyquist*, 413 U.S. 756, 775 (1973) (describing the channel through which states may aid the secular facets of religious instruction as a "narrow one").

37. In 1992, Justice Blackmun noted that

Since 1971, the Court has decided 31 Establishment Clause cases. In only one instance, the decision of *Marsh v. Chambers*, has the Court not rested its decision on the basic principles described in *Lemon* . . . . In no case involving religious activities in public schools has the Court failed to apply vigorously the *Lemon* factors.

*Lee v. Weisman*, 112 S. Ct. 2649, 2663 n.4 (1992) (Blackmun, J. concurring) (citation omitted). Since 1992, however, the Court has pulled away from the *Lemon* test, with Justices only sporadically applying its framework. See *Grumet*, 114 S. Ct. at 2515 (Scalia, J., dissenting); *Zobrest v. Catalina Foothills Sch. Dist.*, 113 S. Ct. 2462, 2465-69 (1993); *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 113 S. Ct. 2141, 2149 (1993) (Scalia, J., dissenting).

38. See *Lamb's Chapel*, 113 S. Ct. at 2149-51 (Scalia, J. dissenting) (agreeing "with the long list of constitutional scholars who have criticized *Lemon* and bemoaned the strange Establishment Clause geometry of crooked lines and wavering shapes its intermittent use has produced," and cataloguing the then-current Justice's rejections and criticisms of the *Lemon* test).

39. *Nyquist*, 413 U.S. at 798; *Levitt*, 413 U.S. at 479-80.

40. 413 U.S. 472.

41. *Id.* at 474-75, 480. Key to the Court's decision were the facts that the state aid could be used in administration, grading, compiling, and reporting the results of nonpublic teacher-prepared tests and that the statute did not provide for state audits of nonpublic schools' records to be sure the aid was not used "for religious worship or instruction." *Id.* at 474-77. Furthermore, the tests prepared by the religious schools, could possibly "inculcate students in the religious precepts of the sponsoring church." *Id.* at 480. Thus, the Court characterized the statute as "a direct money grant" to religious schools. *Id.*



*gious Liberty v. Nyquist*,<sup>42</sup> the Court invalidated a state statute that aided nonpublic schools via repair and tuition reimbursement grants.<sup>43</sup> According to the Court, both statutes had the primary effect of advancing religion, in violation of *Lemon's* second prong, because they amounted to direct state subsidization of the sectarian schools' religious mission.<sup>44</sup>

Using *Lemon* as a guide rather than a test,<sup>45</sup> the Court in *Meek v. Pittenger*<sup>46</sup> evaluated a Pennsylvania statute under which "auxiliary services, textbooks, and instructional material[s that were] provided free of charge to children attending public schools" would be loaned to nonsecular schools to be used for secular purposes.<sup>47</sup> The Court found the textbook loan program permissible;<sup>48</sup> however, "the direct loan of instructional material and equipment [had] the unconstitutional primary effect of advancing religion because of the predominantly religious character of the schools benefiting from the Act."<sup>49</sup> Thus, the instructional materials loan violated *Lemon's* second prong and, in turn, the Establishment Clause.<sup>50</sup>

In two similar government aid to religious schools cases, *Aguilar v. Felton*<sup>51</sup> and *School District of the City of Grand Rapids v. Ball*,<sup>52</sup> the

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42. 413 U.S. 756.

43. *Id.* at 798. The Court, regarding the maintenance and repair grants, based its finding on the statute's lack of restriction of the funds to secular uses. *Id.* at 774. For instance, the costs of maintaining a religious school's chapel could be reimbursed under the statute. *Id.* Regarding the tuition reimbursement grants, the Court also found that the grants did not guarantee that the state money would be used for secular purposes. *Id.* at 780. "[T]he effect of the aide is unmistakably to provide . . . financial support for nonpublic, sectarian institutions." *Id.* at 783.

44. *Committee for Pub. Educ. and Religious Liberty v. Nyquist*, 413 U.S. at 779-883; *Levitt v. Committee for Pub. Educ. and Religious Liberty*, 413 U.S. at 480.

45. *Meek v. Pittenger*, 421 U.S. 349, 358-59 (1975).

46. 421 U.S. 349.

47. *Id.* at 351-53.

48. *Id.* at 362 (relying on *Board of Educ. v. Allen*, 392 U.S. 236 (1968) (finding a similar textbook loan program constitutional)). The Court relied on the facts that the textbooks provided were those used in public schools and that the textbooks were used in nonpublic schools only for secular purposes. *Id.* at 361-62.

49. *Id.* at 363. The Court noted that the over 75% of the nonpublic schools eligible for aid under the statute were religiously affiliated and therefore the "primary beneficiaries" of the statute were "nonpublic schools with a predominant sectarian character." *Id.* at 364. Due to the character of the schools, "[s]ubstantial aid [to them] necessarily results in aid to the sectarian school enterprise as a whole." *Id.* at 366 (citing *Lemon v. Kurtzman*, 403 U.S. 602, 657 (1971)).

50. *Id.* at 366.

51. 473 U.S. 402 (1985).

52. 473 U.S. 373 (1985).

Court again struck down the aid schemes at issue. These companion cases involved the use of federal funds to send public school teachers to and provide classes at nonpublic schools.<sup>53</sup>

In *Aguilar*, a New York City program provided funding for the educational needs of "educationally deprived children from low-income families."<sup>54</sup> The Court found that the "critical elements of entanglement proscribed in *Lemon* and *Meek* [were] . . . present in this case."<sup>55</sup> Those two elements were that "the aid [was] provided in a pervasively sectarian environment," the religiously affiliated sectarian school, and that "ongoing inspection [was] required to ensure the absence of a religious message."<sup>56</sup> Thus, the Court held that because it violated *Lemon's* third prong, this excessive entanglement violated the Establishment Clause.<sup>57</sup>

Similar programs implemented by Grand Rapids, Michigan provided public funding for remedial and community education classes taught by public and nonpublic employees on nonpublic school campuses.<sup>58</sup> The *Grand Rapids* Court found that because some of the classes were conducted by nonpublic teachers and many of the subjects were indistinguishable from those taught during the "religious schoolday," there was a "substantial risk" that programs operating in this environment would "be used for religious educational purposes."<sup>59</sup> This kind of "symbolic union" of church and state in the religiously affiliated schools was "sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by the nonadherents as a disapproval, of their individual religious choices."<sup>60</sup> Furthermore, the Court character-

53. *Aguilar*, 473 U.S. at 404-06; *Grand Rapids*, 473 U.S. at 375.

54. *Aguilar*, 473 U.S. at 404-05. The aid consisted of the provision of instructional services, such as remedial reading and remedial mathematics programs, provided on nonpublic school premises and conducted by public employees. *Id.* at 406. Under the statute, 84% percent of the aid went to schools affiliated with the Roman Catholic church. *Id.*

55. *Id.* at 412.

56. *Id.*

57. *Id.* at 414; see also Raymond L. Robin, Note, *Aguilar v. Felton: Lemon Revisited—The Supreme Court's Tug-of-War with the Entanglement Doctrine*, 39 U. MIAMI L. REV. 957 (1985) (noting the significance of the *Aguilar* decision in Establishment Clause jurisprudence).

58. *School Dist. of Grand Rapids v. Ball*, 473 U.S. 373, 375 (1985). The programs provided for remedial mathematics, home economics, and chess classes. *Id.* at 376-77.

59. *Id.* at 388 (quoting *Committee for Pub. Educ. and Religious Liberty v. Regan*, 444 U.S. 646, 656 (1980)).

60. *Id.* at 390. This opinion represented an important exposition on *Lemon's* second prong. The notion that the primary effects test existed to prevent a state's en-

ized the programs at issue as “indistinguishable from the provision of a direct cash subsidy to the religious school that is most clearly prohibited under the Establishment Clause.”<sup>61</sup> Thus, the programs’ primary effect was the promotion of religion and, as such, they violated *Lemon’s* second prong.<sup>62</sup>

*Aguilar* and *Grand Rapids* represent how similar government aid schemes can violate the Establishment Clause in two different ways, as violations of either *Lemon’s* second or third prong.

Finally, in the area of government aid to religious institutions, the Court in *Larson v. Valente*<sup>63</sup> held that a Minnesota statute, which imposed registration and reporting requirements on religious organizations that solicited more than fifty percent of their funds from nonmembers, was unconstitutional as an impermissible preference of some religious groups over others.<sup>64</sup> Justice Brennan’s majority opinion stated that the Establishment Clause’s “clearest command” is that one religious group must not be preferred over another.<sup>65</sup> The Court found that when such a preference occurs, the law is suspect and must be evaluated using strict scrutiny, a standard which the program at issue in *Larson* could not meet.<sup>66</sup> The Court utilized the strict scrutiny standard of review, rather than the *Lemon* test, because the Court found that the *Lemon* test was only designed to apply to laws which uniformly benefit all religions, rather than provisions like the requirement at issue in *Larson*.<sup>67</sup>

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dorsement of one particular religion or religion in general remains a central Establishment Clause inquiry. *Id.*; see Brief for Petitioner Attorney General of the State of New York at 17, Board of Education of Kiryas Joel Village School District v. Grumet, 114 S. Ct. 2481 (1994) (Nos. 93-517, 93-527 & 93-539); *infra* notes 316-29 and accompanying text (explaining how the notion of endorsement was incorporated into the *Lemon* test). The Court, in *Grand Rapids*, also noted that the concern for preventing government endorsement of religion is particularly acute in educational settings where “[t]he symbolism of a union between church and state is most likely to influence children of tender years, whose experience is limited and whose beliefs consequently are the function of environment as much as of free and voluntary choice.” 473 U.S. at 390.

61. *Grand Rapids*, 473 U.S. at 395.

62. *Id.* at 396; see Von G. Keetch, Note, *Grand Rapids School District v. Ball: An Educational Perspective on the Evolution of Lemon*, 1986 B.Y.U. L. Rev. 489 (1986) (noting the significance of *Grand Rapids* in Establishment Clause jurisprudence).

63. 456 U.S. 228 (1982).

64. *Id.* at 230, 255.

65. *Id.* at 244.

66. *Id.* at 246.

67. *Id.* at 252.

## 2. Neutral Aid Schemes, the Benefit of which Accrues Directly to Citizens Regardless of Religious Affiliation or Non-Affiliation

In this second line of aid to religion cases, the Court developed the principle that the Establishment Clause does not prohibit all state aid to religious organizations, but rather only prohibits aid schemes that advance or inhibit religion.<sup>68</sup> In the cases that follow, laws that advance or inhibit religion are distinguished from laws that are neutral towards religion and, incidentally or intentionally, give some kind of assistance or preference to religious organizations.<sup>69</sup> These neutral aid schemes are the constitutionally permissible means by which a state can aid religion.<sup>70</sup>

In *Walz v. Tax Commission*,<sup>71</sup> the Court evaluated the New York City Tax Commission's exemption from property taxes of property used by religious organizations solely for religious worship.<sup>72</sup> Despite the financial benefit incurred by the exempted properties, the Court concluded that the statute did not constitute an establishment of religion.<sup>73</sup> The opinion acknowledged the difficulty inherent in using government neutrality towards religion as a rigid Establishment Clause test.<sup>74</sup> Nonetheless, the Court based its decision on the statute's neutral treatment of different religious groups in furtherance of the state's legitimate interest in seeing that activities which foster general community improvement are not inhibited by property taxes.<sup>75</sup> Ultimately, the Court found that this statute represented a permissible accommodation of religion.<sup>76</sup>

68. See *infra* notes 71-108 and accompanying text.

69. See *Walz v. Tax Comm'n*, 397 U.S. 664, 672-75 (1970) (reasoning that a tax exemption for places of worship did not advance or inhibit religion, but rather permissibly exempted churches from supporting the state).

70. See *infra* notes 71-108 and accompanying text.

71. 397 U.S. 664 (1970).

72. *Id.* at 666-67.

73. *Id.* at 692-93.

74. *Id.* at 669.

75. *Id.* at 692-93. According to the Court, there were two main secular purposes behind the tax exemptions at issue. *Id.* at 687. First, religious groups "contribute to the well-being of the community in a variety of nonreligious ways." *Id.* Second, religious groups are an important part of the "pluralism of American society" and, along with other groups such as literary and historical groups, contribute to the diversity of viewpoint in society. *Id.* at 689.

76. *Id.* at 692-93. Chief Justice Burger's majority opinion began with the pronouncement that the goal of Establishment Clause jurisprudence was to be "productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference." *Id.* at 669. For a discussion of the notion of

The Ohio statute at issue in *Wolman v. Walter*<sup>77</sup> authorized funding for nonpublic schools in the form of "books, instructional materials and equipment, standardized testing and scoring, diagnostic services, therapeutic services, and field trip transportation."<sup>78</sup> The Court held that all the services were constitutionally permissible, except the provision of instructional material and the field trip transportation funding.<sup>79</sup> Relying on previous decisions on point, the Court upheld the textbook and testing programs.<sup>80</sup> The provision of diagnostic, health-related, therapeutic services represented neutral aid that the state provided to both public and nonpublic students, the primary effect of which was not the advancement of religion.<sup>81</sup> Hence, the state's provision of these services did not violate *Lemon's* second prong or the Establishment Clause.<sup>82</sup> The loan of instructional material, however, did violate the Establishment Clause because the provision of even secular materials directly related to the educational function of the religious schools constituted direct aid to

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benevolent neutrality see ROBERT T. MILLER & RONALD B. FLOWERS, *TOWARD BENEVOLENT NEUTRALITY: CHURCH, STATE, AND THE SUPREME COURT* (3d ed. 1987). The *Walz* Court found that the statute's purpose was "neither the advancement nor the inhibition of religion; it [was] neither sponsorship nor hostility." *Walz*, 397 U.S. at 672. The statute was thus characterized as "simply sparing the exercise of religion from the burden" of property taxes. *Id.* at 673. Tax exemption did not transfer any government money to religious groups, and therefore, the financial benefits incurred by the religious groups did not represent an establishment of religion. *Id.* at 675-76. The opinion emphasized that the history of the United States, as well as modern society, does not mandate absolute separation of church and state and has long allowed tax exemptions for religious groups. *Id.* at 676-86. Thus, the opinion began with the principle of neutrality and through its analysis developed and approved the notion of permissible state accommodations of religion. *Id.* at 692-93; see *infra* notes 109-12 and accompanying text (discussing the notion of governmental accommodation of religion).

77. 433 U.S. 229 (1977).

78. *Id.* at 233.

79. *Id.* at 255.

80. *Id.* at 237-41 (citing *Meek v. Pittenger*, 421 U.S. 349 (1975) (finding textbook loan programs constitutional); *Board of Educ. v. Allen*, 392 U.S. 236, 240 (1968) (same); *Levitt v. Committee for Pub. Educ.*, 413 U.S. 472 (1973) (finding unconstitutional a reimbursement scheme for nonpublic schools' teacher-prepared testing expenses based on the program's lack of assurance that the tests would not involve religious instruction)).

81. *Id.* at 242-48. "This Court's decisions contain a common thread to the effect that the provision of health services to all schoolchildren—public and nonpublic—does not have the primary effect of aiding religion." *Id.* at 242. Regarding the therapeutic services, the Court noted that the services would be performed at public schools, in public centers, or in mobile units not located on private school grounds. *Id.* at 245. Because of this location, the "pervasively sectarian atmosphere of the church-related school" was not present and so the provision of the services would neither impermissibly advance religion nor excessively entangle the state in religion. *Id.* at 247.

82. *Id.* at 242.

the "religious mission that is the only reason for the schools' existence."<sup>83</sup> The field trip transportation also represented direct aid to the religious schools.<sup>84</sup> Consequently, these programs violated *Lemon's* second, or primary effects, prong.<sup>85</sup> As a whole, *Wolman* provides a useful catalogue of what kinds of programs represent constitutionally permissible neutral aid schemes and what kinds represent impermissible direct government funding of religious education.<sup>86</sup>

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83. *Id.* at 250-51 (quoting *Meek*, 421 U.S. at 336). As it did in *Levitt*, 413 U.S. at 480, the Court compared the aid at issue to a cash grant to a religious school and was unable to distinguish between the impermissible cash grant and the aid at issue. *Wolman*, 433 U.S. at 251; see *supra* notes 40-41 and accompanying text.

84. *Wolman*, 431 U.S. at 254.

85. *Id.*

86. The factual nuances of the programs at issue in *Wolman*, as they weigh against the Court's concern for neutrality, help to clarify the Court's distinction between permissible and impermissible aid. The textbook program in *Wolman* authorized the use of state funds to purchase "secular textbooks . . . approved by the superintendent of public instruction for use in public schools in the state and to loan such textbooks to pupils attending nonpublic schools within the district or to their parents." *Id.* at 236-37. This program ensured that the content of the textbooks remained secular. *Id.* at 237-39. As such, the program represented aid given to all students regardless of what school they attended which conveyed a purely secular message. The program that supplied nonpublic school students with "standardized tests and scoring services as are in use in the public schools of the state" also, by its terms, provided services available to public school students to nonpublic school students. *Id.* at 238-39 (citation omitted). These services were also purely secular in that the nonpublic school personnel did not have any control over the content or scoring of the tests, thus the state aid did not convey any nonsecular messages to the test-takers. *Id.* at 239-40. The health diagnostic services, provided in the nonpublic schools by state employees, represented an "insubstantial" danger of aiding religion and thus passed the second prong of the *Lemon* test. *Id.* at 242. The Court also found that the aid would not require "excessive surveillance" and so would not represent an impermissible entanglement under *Lemon's* third prong. *Id.* at 244. Similarly, the therapeutic services, which would not be performed in nonpublic schools, also passed the second and third *Lemon* prongs. *Id.* at 248. This analysis led the Court to find that neutral aid schemes that could in some ways advance religion via the interaction between public employees and nonpublic students remained permissible as long as the advancement of religion remained incidental or insignificant in relation to other effects of the aid. See *id.* at 236-48.

On the other hand, the Court found the program that provided funding for the purchase and loan of instructional materials and equipment like that used in public schools to be unconstitutional. *Id.* at 248-52. This aid, because of its use in a pervasively sectarian school environment, could not be separated from schools' sectarian mission and thus "the state aid inevitably flows in part in support of the religious role of the schools." *Id.* at 250. The potential for the equipment to be integrated into the religious teachings of the nonpublic schools lead the Court to find that this aid

A Minnesota statute which gave parents of children who attended nonpublic schools a tax deduction for the expenses incurred for tuition, textbooks, and transportation associated with sending their children to nonpublic schools survived Establishment Clause analysis in *Mueller v. Allen*.<sup>87</sup> Justice Rehnquist, writing for the majority, observed that the Court's Establishment Clause jurisprudence rejects the argument that any state aid to religious institutions violates the Establishment Clause.<sup>88</sup> The statute passed the *Lemon* test and did not violate the Establishment Clause because legislatures have broad discretion in taxation matters, all parents could deduct education expenses whether their children attended public or nonpublic schools, and the state-funded benefit which flowed to the parochial schools was minimal.<sup>89</sup> The statute at issue in *Mueller*, therefore, represents the modern model of neutral state aid to education schemes that are permissible under the Establishment Clause.<sup>90</sup>

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program was indistinguishable from a cash grant to the schools and thus was unconstitutional direct aid to religious schools. *Id.* at 251. The Court found the field trip aid flawed in the same ways as the equipment aid scheme. *Id.* at 254. The field trip aid did not provide services that could be distinguished from the schools' sectarian teachings and therefore represented "an impermissible direct aid to sectarian education." *Id.*

Thus, the distinction between a permissible neutral aid scheme and impermissible direct aid to religion is made by the Court's classification of the aid as available to all public and nonpublic students, predominantly secular in its purpose and message, and relatively incapable of diversion to sectarian use, versus a classification of the aid as providing a direct subsidy of the recipient school's ability to advance its sectarian mission. *Id.* at 248-52.

Also differentiating permissible neutral aid schemes from impermissible direct government funding, the Court provided a useful analogy in *Witters v. Washington Department of Services for the Blind*, 474 U.S. 481, 486-88 (1986). In *Witters*, the Court explained that a state may issue a paycheck to a government employee who then donates that money to a religious group without violating the Constitution, even if the state knew of the intended donation before issuing the check. *Id.* at 486-87. On the other hand, a state may not grant direct subsidies to religious groups, whether in cash or in kind, or indirectly through a student or parent, without violating the Constitution. *Id.* at 487-88 (citing *School Dist. of Grand Rapids v. Ball*, 473 U.S. 373, 394 (1985); *Wolman*, 433 U.S. at 248-51).

87. 463 U.S. 388, 390-92 (1983). Despite the Court's notation of *Lemon* as "no more than a helpful signpost" for Establishment Clause cases, the Court framed its analysis around *Lemon's* three prongs. *Id.* at 394, 396, 403.

88. *Id.* at 393.

89. *Id.* at 384-97, 403.

90. This case represents a similar analysis to that used by the Court in *Wolman*, 433 U.S. 229, to uphold the health diagnostic and therapeutic services programs at issue in that case. See *supra* notes 77-86 and accompanying text. Justice Rehnquist, in *Mueller*, strengthened the notion, introduced in *Wolman*, 433 U.S. at 241-48, that to violate the Establishment Clause, an aid scheme's *primary* effect must be the advancement of religion. *Mueller*, 463 U.S. at 396-402.

For commentary regarding the *Mueller* decision, see Elizabeth A. Baergen, Note,

The Adolescent Family Life Act (AFLA) provided for "grants to public or nonprofit private organizations or agencies 'for services and research in the area of premarital adolescent sexual relations and pregnancy.'"<sup>91</sup> In *Bowen v. Kendrick*,<sup>92</sup> the Court found that despite the fact that monies granted under the act went to religiously affiliated institutions and were used to further "the elimination or reduction of social and economic problems caused by teenage sexuality, pregnancy, and parenthood," the AFLA did not violate the Establishment Clause.<sup>93</sup> Applying the *Lemon* test, the Court found the AFLA valid on its face.<sup>94</sup> The Court also reiterated its position that "religious institutions are [not] disabled by the First Amendment from participating in publicly sponsored social welfare programs."<sup>95</sup>

The Court, in *Witters v. Washington Department of Services for the Blind*<sup>96</sup> and *Zobrest v. Catalina Foothills School District*,<sup>97</sup> held that the

*Tuition Tax Deductions and Credits in Light of Mueller v. Allen*, 31 WAYNE L. REV. 157 (1984); John W. Connolly, Note, *Mueller v. Allen: A New Standard of Scrutiny Applied to Tax Deductions for Educational Expenses*, 1984 DUKE L.J. 983 (1984); J. Edward Goff, Recent Development, 29 VILL. L. REV. 505 (1984); Elliot M. Schachner, *Religion and the Public Treasury After Taxation with Representation of Washington, Mueller, and Bob Jones*, 1984 UTAH L. REV. 275 (1984); Hugh F. Smart, Note, *Tax Deductions as Permissible State Aid to Parochial Schools*, 60 CHI-KENT L. REV. 657 (1984).

91. *Bowen v. Kendrick*, 487 U.S. 589, 593 (1988) (citation omitted).

92. 487 U.S. 589.

93. *Id.* at 593, 597, 602. The *Bowen* decision received both criticism and praise. See, e.g., Margo R. Drucker, Comment, *Bowen v. Kendrick: Establishing Chastity at the Expense of Constitutional Prophylactics*, 64 N.Y.U. L. REV. 1165 (1989); Joel T. Ireland, Note, *The Transfiguration of the Lemon Test: Church and State Reign Supreme in Bowen v. Kendrick*, 32 ARIZ. L. REV. 365 (1990); Alexandra Petrich, Comment, *Bowen v. Kendrick: Retreat from Prophylaxis in Church-State Relationships*, 16 HASTINGS CONST. L.Q. 513 (1989); David T. Rothal, Note, *Bowen v. Kendrick: Church and State, and the Morality of Teenage Sex*, 39 DEPAUL L. REV. 1319 (1990); Coreen K. Sweeney, Note, 39 DRAKE L. REV. 783 (1989-1990).

94. *Bowen*, 487 U.S. at 622. The AFLA's secular purpose of preventing the problems created by "teenage sexuality" and its ramifications allowed the AFLA to pass *Lemon's* first prong. *Id.* at 602. Finding that the Establishment Clause does not prohibit Congress from recognizing that religious institutions can help solve social problems and that the AFLA provided for grants to religious and a variety of other institutions in a neutral manner among religious groups and between religious and nonreligious groups, the Court held that the AFLA passed *Lemon's* second prong. *Id.* at 604-615. Finally, the government monitoring of institutions receiving AFLA grants would not be excessive and therefore would not violate *Lemon's* third prong. *Id.* at 616-17.

95. *Id.* at 609.

96. 474 U.S. 481 (1986).



provision of special educational services for disabled students attending religious schools, under neutral state and federal aid programs, was constitutionally permissible.<sup>98</sup>

*Witters* involved a blind student who was denied state vocational assistance for blind students because he attended a Christian college.<sup>99</sup> The Court applied the *Lemon* test and found that providing state aid directly to students did not constitute an establishment of religion regardless of the fact that a student receiving that aid attended a private religious school.<sup>100</sup>

In *Zobrest*, the Court did not rely on the *Lemon* test to uphold a state's provision of an interpreter for a deaf sectarian school student under the Individuals with Disabilities Act (IDEA).<sup>101</sup> Chief Justice Rehnquist's ma-

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97. 113 S. Ct. 2462 (1993).

98. *Zobrest*, 113 S. Ct. at 2469; *Witters*, 474 U.S. at 489.

99. *Witters*, 474 U.S. at 482.

100. *Id.* at 488. The Court found a valid primary secular purpose in the state's desire to aid the visually handicapped through vocational rehabilitation services. *Id.* at 485-86. Because the statute provided aid directly to the student who then gave it to the educational institution, the aid was available regardless of the recipient's choice of institution and the aid did not benefit religious more than nonreligious vocations or institutions. *Id.* at 486-89. Hence, the latter *Lemon* prongs were not violated and the statute survived. *Id.*

For commentary on the *Witters* decision, see Megan E. Bovee et al., Comment, *Witters v. Washington Department of Services for the Blind: The Establishment Clause and Financial Aid to Students for Religious Education at Private Institutions*, 13 J.C. & U.L. 397 (1987); Stephen B. Thomas, *Freedom of Choice in Higher Education: Witters v. Washington Department of Services for the Blind*, 31 EDUC. L. REP. 373 (West 1986).

101. *Zobrest*, 113 S. Ct. at 2464; see *infra* notes 447-85 and accompanying text (discussing what the Individuals with Disabilities Education Act (IDEA) requires and how it can exist alongside the Establishment Clause); see also *Florence County Sch. Dist. Four v. Carter*, 114 S. Ct. 361, 366 (1993) (holding that reimbursement for tuition costs of sending a disabled child to a private school was not barred where public school did not meet IDEA requirements and private school was in substantial compliance with IDEA requirements).

*Zobrest* generated a staggering volume of commentary. See, e.g., Dixie S. Huefner, *Zobrest v. Catalina Foothills School District: A Foothill in Establishment Clause Jurisprudence?*, 87 EDUC. L. REP. 15 (West 1994); T. Page Johnson, *Zobrest v. Catalina Foothills School District: Does the Establishment Clause Bar Sending Public School Employees into Religious Schools?*, 82 EDUC. L. REP. 5 (West 1993); T. Johnathan Adams, Note, *Interpreting State Aid to Religious Schools Under the Establishment Clause: Zobrest v. Catalina Foothills School District*, 72 N.C. L. REV. 1039 (1994); Kaarin Long, Note, *Zobrest v. Catalina Foothills School District: A Misapplication of Establishment Clause Precedent*, 39 S.D. L. REV. 404 (1994); Judith S. Rosen, Note, *Zobrest v. Catalina Foothills School District: Should the Wall Between Church and State Come Crumbling Down? Funding Sign Language Interpreters and the First Amendment*, 23 GOLDEN GATE U. L. REV. 85 (1993); Jody Sturtz, Note, *Zobrest v. Catalina Foothill School District: Handicapped Children Versus the Establishment*

jority opinion relied on the principle that the Court has "never said that 'religious institutions are disabled by the First Amendment from participating in publicly sponsored social welfare programs.'"<sup>102</sup> The Court reiterated its opinion that neutral provisions of government services given directly to students and that happen to benefit nonpublic school children are constitutional.<sup>103</sup>

These two cases, taken together, demonstrate how, with or without the *Lemon* test, the Court found that a student's enrollment at a religious educational institution does not automatically make him or her ineligible to receive the benefits of neutral government aid schemes which are applicable to all students.<sup>104</sup>

The Court proactively enforced its previous holdings that states may neutrally provide students with services that incidentally benefit religious institutions in *Lamb's Chapel v. Center Moriches Union Free School District*.<sup>105</sup> In *Lamb's Chapel*, the Court unanimously held that the School District's refusal to allow religious programs to be run after-hours in school buildings where non-religious activities were permitted was an impermissible, viewpoint-based violation of *Lamb's Chapel's* free speech rights.<sup>106</sup> The Court went on to dismiss the School District's claim that allowing religious groups to use the government facilities would constitute an establishment of religion.<sup>107</sup> Because allowing religious groups to

*Clause*, 1994 DET. C.L. REV. 279 (1994).

102. *Zobrest*, 113 U.S. at 2466 (quoting *Bowen v. Kendrick*, 487 U.S. 589, 609 (1988)).

103. *Id.* "[G]overnment programs that neutrally provide benefits to a broad class of citizens defined without reference to religion are not readily subject to an Establishment Clause challenge just because sectarian institutions may also receive an attenuated financial benefit." *Id.* (citing *Witters v. Washington Dept. of Services for the Blind*, 474 U.S. 481 (1986); *Mueller v. Allen*, 463 U.S. 388 (1983)).

104. For a discussion of how attendance at a private religious school affects a student's receipt of special education aid and the relevant Establishment Clause concerns, see *infra* notes 447-85 and accompanying text.

105. 113 S. Ct 2141 (1993). Justice Scalia's concurrence is particularly interesting for its condemnation of the *Lemon* test. *Id.* at 2149 (Scalia, J., concurring). Justice Scalia likens the test to a "ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried." *Id.*

106. *Id.* at 2147.

107. *Id.* at 2148; see also *Board of Educ. v. Mergens*, 496 U.S. 226, 253 (1990) (holding that the Equal Access Act of 1984, which prevented federally funded public schools that provided a limited open forum to student groups from discriminating among such groups based on religion, among other things, did not violate the Establishment Clause and, therefore, such a school is required to allow student religious groups to be recognized and hold meetings on campus on the same basis as nonreli-

use the facilities posed "no realistic danger that the District was endorsing religion . . . and any benefit to religion or to [Lamb's Chapel] would have been no more than incidental," the Court found that Lamb's Chapel's use of the facilities, under neutral facility-use regulations, passed the *Lemon* test and, hence, was constitutionally permissible.<sup>108</sup>

### 3. Removal of Government Obstacles to Free Exercise

Establishment Clause cases frequently acknowledge that "government may (and sometimes must) accommodate religious practices and . . . may do so without violating the Establishment Clause."<sup>109</sup> Disputes surrounding governmental accommodations of religious practices usually occur when Free Exercise Clause<sup>110</sup> and Establishment Clause concerns arise in the same case and the Court attempts to reconcile the competing interests protected by the clauses without violating either.<sup>111</sup> Factually, *Grumet* closely parallels *Wisconsin v. Yoder*, an important case which focused on governmental accommodation of religion.<sup>112</sup>

*Yoder*, a Free Exercise Clause case,<sup>113</sup> involved the appeal of the conviction of Amish parents for violating Wisconsin's compulsory school attendance law.<sup>114</sup> The parents refused to send their children to public school after the eighth grade because "their children's attendance at high

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gious student groups).

108. *Lamb's Chapel*, 113 S. Ct. at 2148. The Court found that allowing religious groups to use the facilities would not violate the *Lemon* test. *Id.*

109. Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet, 114 S. Ct. 2481, 2492 (1994); *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136, 144-45 (1987); *Walz v. Tax Comm'n*, 397 U.S. 664, 673 (1970); see also Lupu, *supra* note 25 (discussing the interplay of separationism and accommodationist principles in Establishment Clause jurisprudence).

110. U.S. CONST. amend. I.

111. See TRIBE, *supra* note 25, at 1166-79 (exploring reconciliation of the religion clauses through accommodation). "A pervasive difficulty in the constitutional jurisprudence of the religion clauses has . . . been the struggle 'to find a neutral course between the two Religion Clauses, both of which are cast in absolute terms, and either of which, if expanded to a logical extreme, would tend to clash with the other.'" *Id.* at 1157 (quoting *Walz*, 397 U.S. at 668-69); see also Jesse H. Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict*, 41 U. PITT. L. REV. 673, 673 (1980) (evaluating the "ineluctable tension that exists between" the two religion clauses); Jay Schlosser, Note, *The Establishment Clause and Justice Scalia: What the Future Holds for Church and State*, 63 NOTRE DAME L. REV. 380, 380 (1988) (noting that reconciliation of the two clauses is a crucial First Amendment problem).

112. 406 U.S. 205 (1972).

113. The first two clauses of the First Amendment are known collectively as the religion clauses. See NOWAK & ROTUNDA, *supra* note 25, at 1157. "[T]he Court has reviewed the claims under the different clauses on independent bases and has developed separate tests for determining whether a law violates either clause." *Id.*

114. *Yoder*, 406 U.S. at 209.

school, public or private, was contrary to the Amish religion and way of life."<sup>115</sup> The parents also complained that if their children attended high school, the parents "would not only expose themselves to the danger of the censure of the church community, but . . . also endanger their own salvation and that of their children."<sup>116</sup> In deciding the case, the Court weighed the Amish's interest in preserving their right to free exercise of religion, including the strong detrimental impact compelled high school attendance would have on the Amish students and the Amish way of life,<sup>117</sup> against the state's interest in preserving its system of compulsory education.<sup>118</sup> The Court held that the state's interest was not sufficiently served by compelling the Amish children to attend high school given the impact attendance would have on the Amish religion.<sup>119</sup> Furthermore, the Court held that accommodating the Amish would not constitute an establishment of religion.<sup>120</sup>

*Yoder* is an important part of the Establishment Clause picture because it represents a situation where the Court required a state to give special treatment to a particular religious group based on that group's rights under the Free Exercise Clause and held that such treatment would not offend the Establishment Clause. Usually, as will be discussed in the next section, special government treatment of groups based on their religious affiliation results in an Establishment Clause violation.<sup>121</sup>

Taken together, these three lines of Establishment Clause cases exemplify three principles underlying Establishment Clause doctrine: the government may not directly aid religious institutions; the government may sweep religious institutions up into generally applicable government aid programs; and the government may sometimes accommodate citizens' free exercise of religion without running afoul of the Establishment Clause.

#### B. Allocation of State Power Based on or in Support of Religion

The second area of Establishment Clause jurisprudence underlying the

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115. *Id.* at 209.

116. *Id.*

117. *Id.* at 216-19.

118. *Id.* at 221-26.

119. *Id.* at 221-29.

120. *Id.* at 234 n.22 (noting that "[a]ccommodating the religious beliefs of the Amish can hardly be characterized as sponsorship or active involvement").

121. See *infra* notes 122-51 and accompanying text.

*Grumet* decision involves governments that give special treatment to groups because of their religious affiliation. What differentiates these cases from those discussed in the previous section is that, while the aforementioned cases usually involved direct or indirect financial support of religious institutions by the state, these cases involve either administrative or symbolic preference of particular religious groups by the state.<sup>122</sup>

The Court generally disfavors government attempts to confer special civic powers on religious groups.<sup>123</sup> Because the Massachusetts statute at issue in *Larkin v. Grendel's Den, Inc.*<sup>124</sup> gave governing bodies of churches "the power effectively to veto" the liquor license applications of businesses within a 500-foot radius of the church which that body governed,<sup>125</sup> the Court found that the statute violated the Establishment

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122. For instance, at issue in *Meek v. Pittenger*, 421 U.S. 349 (1975), *Committee for Pub. Educ. and Religious Liberty v. Nyquist*, 413 U.S. 756 (1973), and *Levitt v. Committee for Pub. Educ. and Religious Liberty*, 413 U.S. 472 (1973), were aid programs which directly benefitted private religious schools. *Meek*, 421 U.S. at 351-52; *Nyquist*, 413 U.S. at 761-62; *Levitt*, 413 U.S. at 474-76. At issue in cases discussed in this sub-section, such as *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982), and *Lee v. Weisman*, 112 S. Ct. 2649 (1992), on the other hand, were government acts which, in the Court's view, placed governmental authority behind religious groups. *Larkin*, 459 U.S. at 117; *Weisman*, 112 S. Ct. at 2655. Thus, accumulation of state power based on or in support of religion cases do not involve government aid programs, but rather exercises of public authority in nonmonetary ways.

123. Such a conferral is usually viewed by the Court as violating the principle that government must act neutrally towards religion, and "therefore crosses the line from permissible accommodation to impermissible establishment." See *Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*, 114 S. Ct. 2481, 2494 (1994).

124. 459 U.S. 116 (1982). The *Grumet* plurality relied primarily on *Larkin* to frame its analysis. *Grumet*, 114 S. Ct. at 2487-94. Chief Justice Rehnquist, a dissenter in *Grumet*, 114 S. Ct. at 2505 (Rehnquist, C.J., joining Scalia, J., dissenting), was the lone dissenter in *Larkin*. 459 U.S. at 127 (Rehnquist, J., dissenting). In *Larkin*, the Chief Justice stated that the case was "silly" and that, for him, the statute at issue represented a "sensible and unobjectionable" law. *Id.* at 128-30 (Rehnquist, J., dissenting). This kind of attitude is similar to that taken by Justice Scalia regarding the statute at issue in *Grumet*. 114 S. Ct. at 2506 (Scalia, J., dissenting) (finding that "[t]he only thing distinctive about the school is that all the students share the same religion"). Thus, a parallel can be extended not only between the reasoning used in the two lead opinions, but also between the views the dissenters took towards the statutes at issue in *Grumet* and *Larkin*.

125. *Larkin*, 459 U.S. at 117. The controversy which resulted in the *Larkin* case came about when the operators of a restaurant, the back wall of which was only ten feet away from the back of a Catholic parish, were denied a liquor license because of the parish's objection to the license's issuance. *Id.* at 117-18; see Cynthia A. Krebs, Recent Development, *The Establishment Clause and Liquor Sales: The Supreme Court Rushes in Where Angels Fear to Tread: Larkin v. Grendel's Den*, 59 WASH. L. REV. 87 (1983) (commenting on the impact of the *Larkin* decision).

Clause.<sup>126</sup> Despite passing the first *Lemon* prong, the statute failed *Lemon's* second and third prongs "by delegating a governmental power to religious institutions."<sup>127</sup> The Court found that because churches could use their power under the statute to further church interests, the statute's primary effect was the advancement of religion.<sup>128</sup> This caused the statute to fail *Lemon's* second prong.<sup>129</sup> Also, because the statute represented a "fusion of governmental and religious functions,"<sup>130</sup> it led to an excessive entanglement between religious and state powers and, accordingly, failed *Lemon's* third prong.<sup>131</sup>

In *Edwards v. Aguillard*,<sup>132</sup> the Court invalidated a Louisiana statute which required Creation-Science to be taught alongside Evolution-Science in public schools.<sup>133</sup> The Court held that the statute violated the first and second prongs of the *Lemon* test because it served no secular purpose and had the primary purpose of advancing a particular religion.<sup>134</sup> According to the Court, the act's purpose and effect was to conform the public school curriculum to a specific religious viewpoint.<sup>135</sup> Thus, the statute violated the Establishment Clause.<sup>136</sup>

126. *Larkin*, 459 U.S. at 127.

127. *Id.* at 123.

128. *Id.* at 125-26.

129. *Id.* Because the statute conferred a veto power on churches that allowed them to decide which businesses would be granted liquor licenses, that power could be used "for explicitly religious goals." *Id.* at 125. Also, "the mere appearance of a joint exercise of legislative authority by Church and State" would have the effect of advancing religion, in violation of *Lemon's* second prong. *Id.* at 125-26.

130. *Id.* at 126-27 (quoting *District of Abington Township v. Schempp*, 374 U.S. 203, 222 (1963)). The Court found that the "statute enmeshes churches in the exercise of substantial governmental powers contrary to our consistent interpretation of the Establishment Clause; '[t]he objective is to prevent, as far as possible, the intrusion of either [Church or State] into the precincts of the other.'" *Id.* at 126 (quoting *Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971)).

131. *Id.* at 127. Indeed, Chief Justice Burger, writing for the majority, remarked that "[o]rdinary human experience and a long line of cases teach that few entanglements could be more offensive to the spirit of the Constitution" than the one at issue in *Larkin*. *Id.*

132. 482 U.S. 578 (1987).

133. *Id.* at 596-97.

134. *Id.* at 585-94.

135. *Id.* at 593.

136. *Id.* at 597; see N. S. Fletcher, Recent Development, *Edwards v. Aguillard: The Evolution of Secular Purpose in Establishment Clause Jurisprudence*, 62 TUL. L. REV. 261 (1987); Laurie B. Halpern, Note, *Edwards v. Aguillard: The Supreme Court Evaluates the Sincerity of the Louisiana Legislature*, 34 LOY. L. REV. 406 (1988); Van F. McClellan, Comment, *Edwards v. Aguillard: The Creationist-Evolutionist Battle Con-*

While cases like *Larkin* and *Edwards* dealt with statutes that allowed religious groups to participate in the government's performance of public functions, the cases that follow assess whether a state actor endorses religion or compels participation in religious exercises when it engages in the conduct at issue.<sup>137</sup>

*County of Allegheny v. ACLU*<sup>138</sup> involved two winter holiday displays situated on public property in Pittsburgh, Pennsylvania.<sup>139</sup> The unconstitutional display consisted of a crèche located on the Grand Staircase of the Allegheny County Courthouse.<sup>140</sup> The constitutionally permissible display consisted of a Christmas tree, a "sign saluting liberty," and a menorah located outside Allegheny's City-County Building.<sup>141</sup> In its analysis, the Court focused on the principle, inherent in *Lemon's* prohibition of a primary effect of aiding or advancing religion, that the Establishment Clause prohibits a state from endorsing a particular religion or endorsing religion over nonreligion.<sup>142</sup>

[T]his Court has come to understand the Establishment Clause to mean that government may not promote or affiliate itself with any religious doctrine or organization, may not discriminate among persons on the basis of their religious beliefs and practices, may not delegate a governmental power to a religious institution, and may not involve itself too deeply in such an institution's affairs.<sup>143</sup>

Applying this endorsement approach, the Court found that the crèche's celebration of Christmas in a solely Christian manner effectively en-

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tinues, 13 OKLA. CITY U. L. REV. 631 (1988); Sherri Schaeffer, Note, *Edwards v. Aguillard: Creation Science and Evolution—The Fall of Balanced Treatment Acts in the Public Schools*, 25 SAN DIEGO L. REV. 829 (1988).

137. See *County of Allegheny v. ACLU*, 492 U.S. 573, 592-93 (1989); Wallace v. Jaffree, 472 U.S. 38, 70 (1985) (O'Connor, J., concurring). For a discussion of Justice O'Connor's separate endorsement test, see *infra* notes 316-29 and accompanying text.

138. 492 U.S. 573 (1989).

139. *Id.* at 578-79; see also *Lynch v. Donnelly*, 465 U.S. 668 (1984). In *Lynch*, the Court found that the inclusion of a crèche in a city's Christmas display was not an unconstitutional establishment of religion. *Id.* at 687. *Lynch* laid the framework for the Court's analysis in *Allegheny*, especially Justice O'Connor's concurring opinion in *Lynch* which introduced her variation on *Lemon* based on endorsement principles. *Id.* at 687-90; see *infra* notes 316-29 and accompanying text; see also Joshua D. Zarrow, Comment, *Of Crosses and Creches: The Establishment Clause and Publicly Sponsored Displays of Religious Symbols*, 35 AM. U. L. REV. 477 (1986) (examining the evolution of the Court's treatment of public religious symbol displays).

140. *Allegheny*, 492 U.S. at 578-79.

141. *Id.*

142. *Id.* at 592-93. The Court noted this concern for endorsement as falling under the second, effects prong of the *Lemon* test. *Id.* Thus, while the Court generally framed its analysis around the *Lemon* test, the notion of endorsement emerged as the central basis upon which its decision rested. See James M. Lewis & Michael L. Vild, Note, *A Controversial Twist of Lemon: The Endorsement Test as the Establishment Clause Standard*, 65 NOTRE DAME L. REV. 671 (1990).

143. *Allegheny*, 492 U.S. at 590.

dorsed Christianity and violated *Lemon's* second prong.<sup>144</sup> In contrast, the menorah display's inclusion of other holiday symbols created a permissible "overall holiday setting" that represented "both Christmas and Chanukah," and thus did not impermissibly endorse one religion in violation of *Lemon's* second prong.<sup>145</sup>

Finally, in *Lee v. Weisman*,<sup>146</sup> the Court found that the inclusion of invocations and benedictions in a public high school's graduation ceremony violated the Establishment Clause without relying on the *Lemon* test.<sup>147</sup> "These dominant facts mark and control the confines of our decision: State officials direct the performance of a formal religious exercise . . . . Even for those students who object to the religious exercise, their attendance and participation in the state-sponsored religious activity are in a fair and real sense obligatory . . . ." <sup>148</sup> The Court's decision rested upon "prayer in school" precedent<sup>149</sup> and the need to preserve the state's detachment from religious decisions and sponsorships in order to prevent government from coercing citizens to adopt or participate in religious beliefs or practices.<sup>150</sup> In addition, the Court observed that

144. *Id.* at 601-02.

145. *Id.* at 614.

146. 112 S. Ct. 2649 (1992).

147. *Id.* at 2652-67. An incredible number of commentaries were generated by the *Lee* opinion because of its ramifications for the prayer in school issue, its effect on the *Lemon* test, and Justice Kennedy's use of his coercion test, among other things. See, e.g., Dina F. El-Sayed, *What is the Court Trying to Establish?: An Analysis of Lee v. Weisman*, 21 HASTINGS CONST. L.Q. 441 (1994); Timothy C. Caress, Note, *Is Justice Kennedy the Supreme Court's Lone Advocate for the Coercion Element in Establishment Clause Jurisprudence? An Analysis of Lee v. Weisman*, 27 IND. L. REV. 475 (1993); Paula S. Cohen, Comment, *Psycho-Coercion, A New Establishment Clause Test: Lee v. Weisman and its Initial Effect*, 73 B.U. L. REV. 501 (1993); Marilyn Perrin, Note, *Lee v. Weisman: Unanswered Prayers*, 21 PEPP. L. REV. 207 (1993); Kevin E. Broyles, Recent Development, *Establishment of Religion and High School Graduation Ceremonies*, 16 HARV. J.L. & PUB. POL'Y 279 (1993).

148. *Weisman*, 112 S. Ct. at 2655.

149. Inclusion of the invocations and benedictions "conflicts with settled rules pertaining to prayer exercises for students, and that suffices to determine the question before us." *Id.* at 2655. Thus, *Lemon* was neither applied nor rejected by the Court in *Weisman*. *Id.* In *District of Abington Township v. Schempp*, the Court held unconstitutional the opening of public school days with Bible readings from which students could be excused by their parents. 374 U.S. 203, 205 (1963). Later, in *Wallace v. Jaffree*, the Court invalidated a moment of silence for "meditation or voluntary prayer" in public schools. 472 U.S. 38, 41-42, 60 (1985).

150. *Weisman*, 112 S. Ct. at 2655-61; see Paulsen, *supra* note 31 (analyzing the future role of Justice Kennedy's coercion test); Rodney K. Smith, *Conscience, Coercion and the Establishment of Religion: The Beginning of the End to the Wandering of a*



the prayer's inclusion in the graduation ceremony effectively compelled students' participation in a religious exercise.<sup>151</sup>

While the facts of these two kinds of cases within the area of allocation of state power in support of religion are distinguishable, the Constitution is violated by the rules at issue because they allow religious groups to step too far into the public arena and, as a result, exercise governmental authority or receive the government's endorsement in violation of the Establishment Clause.

In summary, these two lines of authority in Establishment Clause cases, state aid to religious institutions cases and allocation of state power on the basis of religion cases, represent the roadmap before the Court in *Grumet*. Four general principles are discernible from these cases: the government may not directly aid or entangle itself with religion; the government may promulgate neutral aid schemes from which religion may incidentally benefit; the government may not delegate its power to religious groups; and the government may not endorse a particular religion. *Grumet* turned on which of these principles the New York legislature invoked when it attempted to accommodate disabled children in the Village of Kiryas Joel.

### III. FACTS OF THE CASE

#### A. *The Village of Kiryas Joel*

During the early twentieth century, the Satmar Hasidic sect of Judaism was formed by Grand Rebbe Joel Teitelbaum in the Hungarian town from which the sect takes its name.<sup>152</sup> Following World War II, the Grand Rebbe and his followers immigrated to the United States and settled in Brooklyn, New York.<sup>153</sup> In the early 1970s, the Satmars began forming what is now known as the Village of Kiryas Joel<sup>154</sup> (the Village) in the town of Monroe, New York.<sup>155</sup> New York's Village Law allowed

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*Wayward Judiciary?*, 43 CASE W. RES. L. REV. 917 (1993) (same); see also Ronald C. Kahn, *God Save Us From the Coercion Test: Constitutive Decisionmaking, Polity, Principles, and Religious Freedom*, 43 CASE W. RES. L. REV. 983 (1993) (rejecting Dean Smith and Professor Paulsen's analysis of the potential effects and benefits of the coercion test).

151. *Weisman*, 112 S. Ct. at 2660.

152. Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet, 114 S. Ct. 2481, 2485 (1994).

153. *Id.*

154. *Id.* The Village of Kiryas Joel, "roughly translated means 'Community of Joel.'" Decision on Sufficiency of Petition, Joint Appendix at 8, Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet, 114 S. Ct. 2481 (1994) (Nos. 93-517, 93-527 & 93-539).

155. *Grumet*, 114 S. Ct. at 2485.

groups who completed the necessary procedures to form a new village within an existing town.<sup>166</sup> In 1977, the Village incorporated under this

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156. *Id.*; see N.Y. VILLAGE LAW §§ 2-200 to -258 (McKinney 1973 & Supp. 1994). The traditional reasons for the formation of a village within a town in New York were "the desire and need of residents of a more densely populated area for municipal services which in the past were usually not available at the hands of the Town or County." Decision on Sufficiency of Petition, Joint Appendix at 9. Because these services, such as water supply, police and fire protection, and sewer systems, are now provided by the town and county in New York, "the need for self-incorporation into villages has, for the most part, disappeared." *Id.* When it sought incorporation, the Village was already receiving these services and so its desire to incorporate was atypical. *Id.* at 9-10. The Town of Monroe's (Monroe) zoning ordinances prohibited the Satmar from converting the buildings in the Monwood area of the town, where the Satmar purchased property to form a community and later did form the Village, into the kind of dwellings they desired. *Id.* at 11. This led to a dispute between the Satmar and Monroe. *Id.* at 11-13. As a result of this somewhat lengthy and bitter dispute, the Satmar petitioned to form a new village. *Id.* at 12. The boundaries of the new village included many non-Satmar landowners who opposed incorporation, as did Monroe's town board. *Id.* After more dispute between the landowners, the town board, and the Satmars, the parties agreed to a smaller village. *Id.* at 13. Commenting on this compromise, Monroe's Supervisor noted that:

To me, and I believe to the Town Board, the compromise is almost as distasteful as the dispute it settled. The Satmar Hasidim has taken advantage of an obviously archaic State statute to slip away from the Town's enforcement program without the Town having the slightest possibility of commenting on the inappropriate reasons for formation of the new village. Were the village proposed prior to the accusations or after they were adjudicated, it would be a different matter, but to utilize the self incorporation procedure during the pendency of a vigorously litigated issue in which the Town has accused the Satmar community of serious and flagrant violations of its Zoning Law, is almost sinister and surely an abuse of the right of self incorporation.

*Id.* at 13-14. Despite these objections, the requirements of the Village Law were met and the Village was permitted to incorporate. *Id.* at 14-16. Perhaps somewhat ironically, the Supervisor added these words at the end of his decision regarding the Village's incorporation:

With this approval I hope a new era of well being will spring up between the Satmar community and the rest of Monroe . . . . For the Satmars to believe that they are above or separate from the rules and regulations that Monroe has chosen to live by or try to impose their own mores upon the community of Monroe, or to hide behind the self-imposed shade of secrecy or cry out religious persecution when there is none, will only lead to more confrontations as bitter as the one this decision purports to resolve.

*Id.* at 15-16. In *Grumet*, the Court did not scrutinize the actual formation of the Village under the Establishment Clause. See *Grumet*, 114 S. Ct. at 2485. Justice Scalia, however, pointed out that other religiously homogeneous counties, and probably also cities, exist throughout the United States. *Id.* at 2508 n.2 (Scalia, J., dissenting).

law.<sup>157</sup> At the time of the Supreme Court's decision in *Grumet*, the Village population totaled about 8,500.<sup>158</sup>

Satmar Hasidism is an ultraorthodox form of Judaism.<sup>159</sup> "The Satmar sect is the most conservative and traditional of the Hasidic" Jews.<sup>160</sup> The Talmud<sup>161</sup> guides all aspects of the Satmars' life "from dress to diet."<sup>162</sup> Village residents are "vigorously religious people who make few concessions to the modern world and go to great lengths to avoid assimilation into it."<sup>163</sup> Regarding education, children attend private schools within the Village.<sup>164</sup> Strict separation between the sexes is practiced by the Satmars in almost all social settings, school notwithstanding.<sup>165</sup> Boys attend the United Talmudic Academy and receive extensive instruction in the Torah and minimal introductions to secular subjects.<sup>166</sup> Girls attend Bais Rochel where they are prepared for their lives as wives and mothers.<sup>167</sup> Since its incorporation, the Village has faced numerous legal battles regarding the education of its children.<sup>168</sup>

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157. *Grumet*, 114 S. Ct. at 2485-86. Justice O'Connor, in her *Grumet* concurrence, characterized the Village's incorporation as a response to the fact that the Satmar's "traditionally close-knit extended family" structure was incompatible with Monroe's zoning ordinances, as were the Satmar's use of homes as schools and synagogues. *Id.* at 2495-96 (O'Connor, J., concurring). She went on to characterize the village incorporation law used by the Satmars to incorporate as a fortunate accommodation of the Satmar's special needs. *Id.* at 2496 (O'Connor, J. concurring).

158. *Id.* at 2485.

159. *Id.* at 2484-85.

160. Respondents' Brief at 1, Board of Educ. of Kiryas Joel Village Sch. Dist. v. *Grumet*, 114 S. Ct. 2481 (1994) (Nos. 93-517, 93-527 & 93-539).

161. The Talmud is the Jewish book of law and tradition. *Id.*

162. *Id.*

163. *Grumet*, 114 S. Ct. at 2485.

164. *Id.*

165. Respondents' Brief at 2. Gender separation is not required between immediate family members or between children with disabilities. *Id.*

166. *Grumet*, 114 S. Ct. at 2485.

167. *Id.*

168. See *Parents' Ass'n. v. Quinones*, 803 F.2d 1235 (2d Cir. 1986) (reversing denial of preliminary injunction preventing implementation of a separate special education program, detached from the school's general population, for female Satmar children of the Village in a public school, as a violation of the Establishment Clause); *Bollenbach v. Board of Educ. of Monroe-Woodbury Central Sch. Dist.*, 659 F. Supp. 1450 (S.D.N.Y. 1986) (holding that the manipulation of public school bus drivers' routing schedules in a manner contrary to the district busing program in order that only male drivers serviced the male Satmar children of the Village violated the Establishment Clause); *Board of Educ. of the Monroe-Woodbury Central Sch. Dist. v. Wieder*, 72 N.Y.2d 174 (1988) (holding that the Monroe-Woodbury District was not compelled to offer special education services to the Satmar children of the Village in regular classes at public schools, nor was it compelled to offer the services at the children's private schools or at a neutral site within the Village).

*B. Attempts to Provide Special Education Services for  
Satmar Children Prior to the Creation of the  
Kiryas Joel Village School District*

Federal and State law required the Board of Education of the Monroe-Woodbury Central School District (hereinafter "the Monroe-Woodbury District")—within which the Village was wholly contained prior to the creation of the Kiryas Joel Village School District (hereinafter "the Kiryas Joel District")—to provide special education services to qualifying disabled Village children.<sup>169</sup> Originally, the Monroe-Woodbury District furnished "health and welfare" services to the Village children at a "neutral site" which annexed Bais Rochel.<sup>170</sup> However, in 1985, the Monroe-Woodbury District ceased providing the services at the neutral cite and began furnishing them only at the district's public schools.<sup>171</sup> The Monroe-Woodbury District took this action in response to the United States Supreme Court's decisions in *Aguilar v. Felton* and *Grand Rapids School District v. Ball*.<sup>172</sup> After sending their children to public schools to receive the services for a time, the disabled children's parents refused to continue to send them outside the Village to the public school because of the "panic, fear and trauma (the children) suffered in leaving their own community and being with people whose ways were so different."<sup>173</sup>

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169. *Wieder*, 72 N.Y.2d at 178; Petitioner Attorney General of the State of New York's Brief at 5, Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet (Nos. 93-517, 93-527 & 93-539). The relevant statutes were the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400-1485 (1988), and N.Y. EDUC. LAW § 4401 et seq. (1981 & Supp. 1994). Petitioner Attorney General of the State of New York's Brief at 5 n.2. The IDEA requires that both private religious and nonreligious school students receive the mandated state aid. Petitioner Board of Education of the Monroe-Woodbury Central School District's Brief at 28, Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet (Nos. 93-517, 93-527 & 93-539); see *infra* notes 454-60 and accompanying text (discussing the IDEA).

170. *Wieder*, 72 N.Y.2d at 180 (citing N.Y. EDUC. LAW §912 (1988)). About 150 Satmar children received these services at the time of the *Wieder* action. *Id.* at 179. The physical and educational learning services aided children with disabilities such as "mental retardation, deafness, speech and language impairments, emotional disorders, learning disabilities, Down's syndrome, spina bifida and cerebral palsy." *Id.*

171. *Id.* at 180.

172. Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet, 114 S. Ct. 2481, 2485 (1994). The provision of education services on-site at private sectarian schools was found to violate the Establishment Clause in *Aguilar v. Felton*, 473 U.S. 402, 414 (1985), and *School District of the City of Grand Rapids v. Ball*, 473 U.S. 373, 397 (1985). See *supra* notes 51-62 and accompanying text.

173. *Wieder*, 72 N.Y.2d at 180-81. One Satmar girl, attending public school, "was

In *Board of Education of the Monroe-Woodbury Central School District v. Wieder*,<sup>174</sup> the Monroe Woodbury District sought a judgment declaring that these special education services could only be provided in "regular public school classes and programs," while the parents of the Village children counterclaimed, demanding a declaration that the district must provide the services "on the premises of the school the children attend for their normal educational instruction."<sup>175</sup> The Court of Appeals of New York held that the state statute which required provision of the special services<sup>176</sup> did not compel the Monroe-Woodbury District to provide the services in the Village's nonpublic schools or at a neutral site, nor did it compel the Monroe-Woodbury District to only offer the services at the public schools.<sup>177</sup>

The Monroe-Woodbury District continued to offer the services only at the public schools to which the Village parents continued to refuse to send their disabled children.<sup>178</sup> As time progressed, only one Village child attended the Monroe-Woodbury District public schools and "the village's other handicapped children received privately funded special services or went without."<sup>179</sup>

### C. Creation of the Village of Kiryas Joel School District

Responding to pressure from the Satmar parents who were dissatisfied with the Monroe-Woodbury District's policy, the New York legislature passed Chapter 748 of the Laws of 1989 (Chapter 748), which provided that the Village constituted a separate school district, the Kiryas Joel District, to be run by locally-elected board members.<sup>180</sup> The Kiryas Joel

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once cast in a Christmas-season skit, as Rudolph the Red-Nosed Reindeer." Joan Biskupic, *School District for Hasidim is Target of High Court Challenge*, WASH. POST, March 28, 1994, at A4.

174. 72 N.Y.2d 174 (1988).

175. *Id.* at 178-79.

176. *Id.* at 181.

177. *Id.* at 189-90.

178. *Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*, 114 S. Ct. 2481, 2486 (1994).

179. *Id.*

180. Petitioner Attorney General of the State of New York's Brief at 5; 1989 N.Y. Laws 748. Chapter 748 provided, in part:

The territory of the village of Kiryas Joel in the town of Monroe, Orange county, . . . shall be and hereby is constituted a separate school district, and shall be known as the Kiryas Joel village school district and shall have and enjoy all the powers and duties of a union free school district under the provisions of the education law . . . Such district shall be under control of a board of education, which shall be composed of from five to nine members elected by the qualified voters of the village of Kiryas Joel, said members to serve for terms not exceeding five years.

District operated one public school which provided special education services to the disabled Village students.<sup>181</sup> By statute, the district was obliged to operate in a secular manner, which included following the public school calendar and conducting classes in a co-ed setting.<sup>182</sup>

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1989 N.Y. Laws 748. Under the statute, the Kiryas Joel District could "take such action as opening schools and closing them, hiring teachers, prescribing textbooks, establishing disciplinary rules, and raising property taxes to fund operation." *Grumet*, 114 S. Ct. at 2486 (citing N.Y. EDUC. LAW § 1709 (McKinney 1988)). Urging passage of this statute, its sponsor commented: "In an honest attempt to tolerate access for a group of children, the Monroe-Woodbury School Board voted unanimously in favor of this bill; and the local newspaper in an eloquent editorial acknowledged efforts by all parties to try to solve the problem and, therefore, wholeheartedly offered its support." Letter from Assemblyman Joseph R. Lentol to Governor Mario Cuomo (July 7, 1989) (Joint Appendix at 19, *Grumet* (Nos. 93-517, 93-527 & 539)); see also Letter from Daniel Alexander, Superintendent of Schools, to Evan Davis, Counsel to the Governor (July 12, 1989) (Joint Appendix at 21, *Grumet* (Nos. 93-517, 93-527 & 93-539)) (urging approval of Chapter 748 and noting endorsement of the measure by the school board of the Monroe-Woodbury Central School District). New York Governor Mario Cuomo acknowledged the fact that all of the District's residents were Satmars, but said the bill represented "a good faith effort to solve this unique problem." Memorandum Filed With Assembly Bill Number 8747, Joint Appendix at 41, *Grumet* (Nos. 93-517, 93-527 & 93-539). For a discussion of the election of the Kiryas Joel District school board and the controversy that surrounded the election, see Brief for the Committee for the Well-Being of Kiryas Joel at 4-10, *Grumet* (Nos. 93-517, 93-527 & 93-539); Respondents' Brief at 2, *Grumet* (Nos. 93-517, 93-527 & 93-539); Petitioner's Reply Brief at 6, *Grumet* (Nos. 93-517, 93-527 & 93-539).

181. Petitioner Attorney General of the State of New York's Brief at 5, *Grumet* (Nos. 93-517, 93-527 & 93-539). The school is "physically separate and apart" from the private religious schools in the Village. Petitioner Board of Education of the Monroe-Woodbury Central School District's Brief at 6.

182. See Petitioner Attorney General of the State of New York's Brief at 5, 18. "The school, like any public school, must have no religious symbols in it. It must operate on the same school calendar as every other district in the area. This sometimes means that the school must be open on Jewish holidays and closed on Christian holidays, such as Christmas." *Id.* at 18; see also *Grumet*, 114 S. Ct. at 2506 (Scalia, J., dissenting). The school was staffed "on a non-sectarian basis" and followed state-prescribed curriculum. Petitioner Board of Education of the Monroe-Woodbury Central School District's Brief at i. The Kiryas Joel District Superintendent was not Hasidic. *Grumet*, 114 S. Ct. at 2506 (Scalia, J., dissenting).

On the other hand, The Washington Post reported on an all-girl music class at the Kiryas Joel District public school where boys were not allowed because "the Satmars forbade girls to sing and dance with boys." Biskupic, *supra* note 173, at A4. Also reported were other sex-segregated classes and a kosher cafeteria. *Id.* For accounts of school-life at the Kiryas Joel District public school and public reaction to the school, see Geraldine Baum, *Crossing the Line? A School for Disabled Hasidic Children Has Some Worried About Separation of Church and State*, L.A. TIMES, Dec.

Upon enactment of the statute, Louis Grumet and Albert W. Hawk, as citizen taxpayers, and as Executive Director of the New York State School Boards Association, Inc. and President of the New York State School Boards Association, Inc., respectively, brought a declaratory judgment action in the New York State Supreme Court, challenging Chapter 748 as a violation of the United States and New York constitutions, alleging that the statute constituted an unconstitutional establishment of religion.<sup>183</sup>

#### D. Grumet in the Lower Courts

An analysis of the New York courts' treatment of *Board of Education of Kiryas Joel Village School District v. Grumet*<sup>184</sup> is instructive for two reasons. First, the opinions demonstrate that *Lemon* remained, before *Grumet*, a test upon which lower courts relied when adjudicating Establishment Clause controversies. Second, this reliance on *Lemon*, after an analysis of the Supreme Court's decision in *Grumet*, appears misplaced.<sup>185</sup> These points reinforce the Court's recent inability, which continued in *Grumet*, to indicate to lower courts the appropriate framework within which to decide Establishment Clause cases.<sup>186</sup>

The Supreme Court of New York held that Chapter 748 violated the Establishment Clause.<sup>187</sup> After noting the muddled character of the Supreme Court's Establishment Clause jurisprudence,<sup>188</sup> the court applied the *Lemon* test and found that Chapter 748 violated all three prongs.<sup>189</sup> According to the court, Chapter 748 lacked a secular purpose, in violation of the first prong, because it, "rather than serving a legitimate gov-

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19, 1993, at E1; Biskupic, *supra* note 173, at A4; Tony Mauro, *Church-State Debate Invades Hasidic "Island": Jewish Group's School Gets Tax Funds*, USA TODAY, March 29, 1994, at A2.

183. *Grumet v. Board of Educ. of the Kiryas Joel Village Sch. Dist.*, 618 N.E.2d 94, 97-98 (N.Y. 1993); U.S. CONST. amend. I; N.Y. CONST. art. XI, § 3. Later, the Court of Appeals modified the Appellate Division's finding of a state constitutional violation and declined to reach that issue. Petitioner Attorney General of the State of New York's Brief at 9.

At the time of the grant of certiorari to the U.S. Supreme Court, the defendants in the action were the Board of Education of the Monroe-Woodbury Central School District, the Board of Education of the Kiryas Joel Village School District and the Attorney General of the State of New York, who appeared, as required by statute, to defend Chapter 748's constitutionality. *Grumet*, 618 N.E.2d at 97-98.

184. 114 S. Ct. 2481 (1994).

185. *See infra* note 208.

186. *See infra* notes 400-15 and accompanying text.

187. *Grumet v. New York State Educ. Dept.*, 579 N.Y.S.2d 1004, 1008 (N.Y. Sup. Ct. 1992).

188. *Id.* at 1007.

189. *Id.*

ernmental end, was enacted to meet exclusive religious needs."<sup>190</sup> The statute had the primary effect of advancing religion, in violation of the second prong, because the District represented "an attempt to camouflage, with secular garments, a religious community as a public school district."<sup>191</sup> Regarding *Lemon's* third prong, the court noted that New York, "in its monitoring capacity [of the district] is unavoidably entangled in matters of religion."<sup>192</sup> Thus, according to the court, Chapter 748 would foster excessive government entanglement with religion and violate *Lemon's* third prong.<sup>193</sup>

On appeal, the Appellate Division of the Supreme Court also found that Chapter 748 violated the Establishment Clause.<sup>194</sup> The court, applying the *Lemon* test, found that the statute probably lacked a secular purpose, in violation of *Lemon's* first prong, because, as the children were already entitled to take advantage of the services at the Monroe-Woodbury District schools, the statute's only purpose was to ensure "that the children would remain subject to the language, lifestyle and environment created by the community of Satmar Hasidim and avoid mixing with children whose language, lifestyle, and environment are not the product of that religion."<sup>195</sup> Analyzing the second prong, the court found that because Chapter 748 authorized a religious community to control secular education services, it represented an endorsement of religion, the primary effect of which would be to enhance religion.<sup>196</sup> The court did not consider the third *Lemon* prong.<sup>197</sup>

The Court of Appeals of New York also framed its analysis around the *Lemon* test, but addressed only the second prong because Chapter 748 "clearly violated" the prong's requirement that advancement of religion is not the law's primary effect.<sup>198</sup> The court relied on the Supreme Court's

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190. *Id.*

191. *Id.*

192. *Id.*

193. *Id.*

194. *Grumet v. Board of Educ. of the Kiryas Joel Village Sch. Dist.*, 592 N.Y.S.2d 123, 126 (1992).

195. *Id.* at 127.

196. *Id.*

197. *Id.* at 129-30.

198. *Grumet v. Board of Educ. of the Kiryas Joel Village Sch. Dist.*, 618 N.E.2d 94, 99 (1993).



recent formulations of the second prong, which focused on whether, given the context of the government action, the "action [was] likely to be perceived as an endorsement of religion."<sup>199</sup>

Because special services are already available to the handicapped children of [the Village], the primary effect of chapter 748 is not to provide those services, but to yield to the demands of a religious community whose separatist tenets create a tension between the needs of its handicapped children and the need to adhere to certain religious practices.<sup>200</sup>

Thus, the court found that Chapter 748 violated the Establishment Clause.<sup>201</sup>

The United States Supreme Court granted certiorari to determine whether Chapter 748 violated the Establishment Clause.<sup>202</sup>

#### IV. ANALYSIS OF OPINIONS

##### A. *Justice Souter's Plurality Opinion*

Justice Souter, delivering the plurality opinion,<sup>203</sup> began his analysis by noting that "[a] proper respect for both the Free Exercise and the Establishment Clauses compels the State to pursue a course of 'neutrality' toward religion . . . ."<sup>204</sup> Chapter 748 violated the principle of government neutrality towards religion because it delegated governmental authority "to a group defined by its character as a religious community, in a legal and historical context that gives no assurance that govern-

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199. *Id.* (citing *Allegheny County v. ACLU*, 492 U.S. 573, 595-97 (1989)).

200. *Id.* at 101.

201. *Id.*

202. 114 S. Ct. 544 (1993).

203. *Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*, 114 S. Ct. 2481, 2484 (1994). No part of Justice Souter's opinion received the support of a majority of justices. Justices Blackmun, Stevens, Ginsburg, and O'Connor joined Justice Souter in various parts of his opinion and thus every part of the opinion received four Justices' support. Justices Blackmun, Stevens and O'Connor concurred in Part I (factual background), II-B (Chapter 748 suspect because it did not ensure the special treatment given to the Village would be given to other similar groups), II-C (principle of accommodation is not abandoned because other alternatives exist for the Satmars), and III (rejection of the dissent's approach). Justices Blackmun, Stevens and Ginsburg concurred in Part II-introduction (overview of applicable law and framework for analysis), and II-A (Chapter 748 represented impermissible fusion of civic and religious authority). Justice Kennedy, however, withheld his support from the Court's opinion and, while concurring in the result, relied entirely on his own opinion to explain his vote. *Id.* at 2500-05 (Kennedy, J., concurring).

204. *Id.* at 2487 (quoting *Committee for Public Educ. and Religious Liberty v. Nyquist*, 413 U.S. 756, 792-93 (1973)). See *infra* notes 428-38 and accompanying text for a discussion of the effect of *Grumet* on the Court's delineation between Free Exercise and Establishment Clause cases.

mental power has been or will be exercised neutrally."<sup>205</sup> *Larkin v. Grendel's Den, Inc.*,<sup>206</sup> according to Justice Souter, controlled the Court's decision in *Board of Education of Kiryas Joel Village School District v. Grumet*.<sup>207</sup> Both the *Larkin* and *Grumet* statutes involved a "fusion of governmental and religious functions"<sup>208</sup> and did not guarantee "that the delegated power '(would) be used exclusively for secular, neutral, and nonideological purposes.'"<sup>209</sup> Justice Souter's analysis focused on Chapter 748's delegation of a governmental function to a religious group, and its lack of assurance that such a provision would not be granted to other similarly situated groups.

### 1. Delegation of a Governmental Function to a Religious Group

"[A] state may not delegate its civic authority to a group chosen according to religious criteria."<sup>210</sup> For Justice Souter, this is the rule under which *Larkin* and *Grumet* similarly violated the Establishment Clause.<sup>211</sup> Justice Souter dismissed the distinction between *Larkin's* direct delegation of governmental power to religious groups and *Grumet's* delegation of governmental power to the Village voters.<sup>212</sup> He admitted that *Grumet* did not involve the kind of "straightforward" delegation of civic power to a religious group that was at issue in *Larkin*.<sup>213</sup> But for Justice Souter, the difference between delegating governmental authority

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205. *Grumet*, 114 S. Ct. at 2487.

206. 459 U.S. 116 (1982) (holding that a Massachusetts statute giving religious bodies veto power over the granting of state liquor licenses violated the Establishment Clause); see *supra* notes 124-31 and accompanying text.

207. *Grumet*, 114 S. Ct. at 2487.

208. *Id.* at 2488 (quoting *Larkin*, 459 U.S. at 126). This fusion occurred "by delegating 'important, discretionary governmental powers' to religious bodies, and thus impermissibly entangling government and religion." *Id.* (quoting *Larkin*, 459 U.S. at 126-27). This contention was also supported by a citation to *Lemon v. Kurtzman*, 403 U.S. 602 (1971), one of only two references to *Lemon* in Justice Souter's entire opinion. *Grumet*, 114 S. Ct. at 2488 (citing *Lemon*, 403 U.S. 602). Justice Souter also used *Lemon* as a citation to support his analysis of how, in *Larkin*, the delegation of governmental function to a religious body failed to ensure that the power would be used neutrally and would lead to a symbolic benefit to religion, thus the primary effect of such a delegation would be to advance religion. *Id.* (citing *Lemon*, 403 U.S. 602).

209. *Id.* at 2488 (quoting *Larkin*, 459 U.S. at 125).

210. *Id.*

211. *Id.*

212. *Id.*

213. *Id.*

to the Village voters and delegating it to a religious group as such was "one of form, not substance."<sup>214</sup>

With this distinction between *Grumet* and *Larkin* removed, Justice Souter next analyzed how Chapter 748 represented the kind of impermissible delegation of government authority that was found to violate the Establishment Clause in *Larkin*. The New York legislature limited the district to Satmars and thus delegated exclusive control over the governmental function of public education in that district to a religious group.<sup>215</sup> Despite Chapter 748's lack of mention of the Village residents' religion, Justice Souter found the context of Chapter 748's enactment demonstrated that the statute nevertheless "identified [the district members] by reference to doctrinal adherence."<sup>216</sup> Thus, Justice Souter concluded that the creation of the Kiryas Joel District via Chapter 748 was "substantially equivalent to defining a political subdivision and hence the qualification for its franchise by a religious test, resulting in a purposeful and forbidden 'fusion of governmental and religious functions.'"<sup>217</sup>

## 2. Lack of Insurance That Governmental Power was Neutrally Conferred

Justice Souter's opinion next expressed concern over Chapter 748's

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214. *Id.*

215. *Id.* "Authority over public schools belongs to the State." *Id.* While Justice Souter admitted that members of a religious group could not be denied their rights as citizens based on their religious affiliations under the Free Exercise clause, he explained that there is a difference between "purposeful delegation on the basis of religion and a delegation on principles neutral to religion, to individuals whose religious identities are incidental to their receipt of civic authority." *Id.* at 2489. Justice Souter did not explain any further why Chapter 748 fell into the former and not the latter category, but rather discussed Chapter 748's facial neutrality towards the Satmar religion. *Id.*

216. *Id.* at 2489. The Court found "this to be the better view of the facts because of the way the boundary lines of the school district divide residents according to religious affiliation, under the terms of an unusual and special legislative act." *Id.* Justice Souter then offered an account of the circumstances surrounding Chapter 748's enactment, emphasizing that it was undisputed that the Village was drawn to include only Satmars. *Id.* The Court emphasized that the Kiryas Joel District was created within an existing district "counter to customary districting practices in the State" which tended to consolidate, rather than divide, districts. *Id.* at 2489-90. Also, the Court noted that districts are usually created under general laws of district reorganization rather than by special act of the legislature. *Id.* at 2490. These facts led the Court to conclude that the Kiryas Joel District was "exceptional to the point of singularity . . . [and so] we have good reasons to treat this district as the reflection of a religious criterion for identifying the recipients of civil authority." *Id.*

217. *Id.* at 2490. (quoting *Larkin*, 459 U.S. at 126). For a discussion of Justice Souter's reliance on "fusion" as the mark of the impermissible intersection between church and state see *infra* notes 340-62 and accompanying text.

special treatment of the Satmar community.<sup>218</sup> In *Larkin*, the "absence of an 'effective means of guaranteeing' that governmental power will be and has been neutrally employed" was key to the unconstitutionality of the statute at issue.<sup>219</sup> Similarly, in *Grumet*, Justice Souter pointed out, no guarantee existed that New York would exercise its power in favor of and confer special benefits on other groups as it did the Satmars.<sup>220</sup> Hence, the statute did not assure the Court that "governmental power will be and has been neutrally employed,"<sup>221</sup> a key principle underlying the Court's Establishment Clause jurisprudence.<sup>222</sup>

Thus, Justice Souter concluded that because it delegated governmental power on a religious basis, resulting in an impermissible fusion of governmental and religious authority, and gave no assurance that this special power would be neutrally or consistently conferred upon other groups, Chapter 748 violated the Establishment Clause.<sup>223</sup>

### 3. Accommodation, Alternatives, and Neutrality

In the final parts of his opinion, Justice Souter contended that his opinion did not: reject the permissibility of governmental accommodation of religion; foreclose all of the Satmars' means of obtaining special education services; or prevent religiously homogeneous groups from exercising political power.<sup>224</sup>

Justice Souter emphasized that neither New York's accommodation of the Satmars' religious needs nor its facilitation of their religious practices

218. *Grumet*, 114 U.S. at 2491.

219. *Id.* (quoting *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 125 (1982)).

220. *Id.* This failure was especially problematic for Justice Souter because

[t]he anomalously case-specific nature of the legislature's exercise of state authority in creating this district for a religious community leaves the Court without any direct way to review such a state action for the purpose of safeguarding a principle at the heart of the Establishment Clause, that government should not prefer one religion to another, or religion to irreligion.

*Id.*

221. *Id.*

222. *Id.* Justice Souter stated that the principle of neutrality "is well grounded in our case law, as we have frequently relied explicitly on the general availability of any benefit provided religious groups or individuals in turning aside Establishment Clause challenges." *Id.* (citing *Bowen v. Kendrick*, 487 U.S. 589 (1988); *Walz v. Tax Comm'n*, 397 U.S. 664 (1970)).

223. *Id.* at 2492.

224. *Id.* at 2492-94. Justices Blackmun, Stevens, and O'Connor joined in these parts of the opinion.

rendered the statute unconstitutional.<sup>225</sup> Rather, New York's singling out of the Satmar sect for special treatment caused the statute's downfall.<sup>226</sup>

According to Justice Souter, other alternatives available to New York to alleviate the Satmars' concern over sending their disabled children to public schools included offering the services at a Monroe-Woodbury District public school<sup>227</sup> or at a "neutral site near one of the village's parochial schools."<sup>228</sup> If either of these alternatives did not produce a satisfactory result, parents could seek administrative review of the programs.<sup>229</sup> In addition, if these alternatives failed to produce appropriate programs, the New York legislature could "certainly enact general legislation tightening the mandate to school districts on matters of special education or bilingual and bicultural offerings."<sup>230</sup>

Finally, Justice Souter emphasized that the Court's opinion must not be interpreted as preventing a religious group from exercising neutrally-conferred political power.<sup>231</sup> Rather, Justice Souter reiterated, Chapter 748 "fail[ed] the test of neutrality" and therefore constituted an "impermissible establishment" of religion.<sup>232</sup>

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225. *Id.* at 2492. "[W]e do not deny that the Constitution allows the state to accommodate religious needs by alleviating special burdens . . . . [T]here is ample room under the Establishment Clause for 'benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference.'" *Id.* (quoting *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 334 (1987)). Regarding the principle of accommodation in Establishment Clause jurisprudence, see *supra* notes 109-11 and accompanying text.

226. *Grumet*, 114 S. Ct. at 2492-93. "[A]ccommodation is not a principle without limits, and what petitioners seek is an adjustment to the Satmars' religiously grounded preferences that our cases do not countenance." *Id.* Justice Souter emphasized that there is a difference between allowing religious groups to "pursue their own interests free from governmental interference" and delegating governmental power to religious groups. *Id.* at 2493. For Justice Souter, the principle of neutrality towards religious groups mandates that such a delegation, or fusion, cannot occur. *Id.*

227. *But see supra* notes 170-79 and accompanying text.

228. *Grumet*, 114 S. Ct. at 2493. Justice Souter suggested that providing services at a neutral site is sanctioned by the Court's decision in *Wolman v. Walter*, 433 U.S. 229, 247-48 (1977). *Id.*; see *supra* notes 77-86 and accompanying text.

229. *Grumet*, 114 S. Ct. at 2493.

230. *Id.*

231. *Id.* at 2493-94. Taking issue with Justice Scalia's dissent, Justice Souter again emphasized that the Court's decision was not designed to prevent religiously homogeneous communities from exercising their political rights. *Id.* Justice Souter stated that the Court did not reject the motive of New York legislature to accommodate the Satmars, but rather the Legislature's method of accomplishing such accommodation through religion-specific, rather than generally applicable, legislation. *Id.* at 2494.

232. *Id.* Rejecting the dissent's approach to the Establishment Clause, Justice Souter proclaimed:

Our job, of course would be easier if the dissent's position had prevailed with the Framers and with this Court over the years. An Establishment

*B. Justice Blackmun's Concurrence*

In his brief concurring opinion, Justice Blackmun expressed his view that the *Grumet* decision did not equate to a departure from the principles of *Lemon v. Kurtzman*.<sup>233</sup> Justice Blackmun also reaffirmed his personal adherence to *Lemon's* principles.<sup>234</sup>

*C. Justice Stevens' Concurrence*

Justice Stevens' concurrence<sup>235</sup> emphasized that Chapter 748 established, and did not accommodate, religion.<sup>236</sup> Justice Stevens reasoned that to alleviate the "panic, fear and trauma" suffered by the Satmar children when attending the Monroe-Woodbury District's public schools, New York could have taught the children's "schoolmates to be tolerant and respectful of Satmar customs."<sup>237</sup> But by creating the Kiryas Joel District, the State instead "provided official support to cement the attachment of young adherents to a particular faith."<sup>238</sup> As such, according to Justice Stevens, Chapter 748 impermissibly created an establishment of religion.<sup>239</sup>

*D. Justice O'Connor's Concurrence*

In her detailed concurrence, Justice O'Connor dealt with what, for her,

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Clause diminished to the dimensions acceptable to Justice Scalia could be enforced by a few simple rules . . . . But that would be as blind to history as to precedent, and the difference between Justice Scalia and the Court accordingly turns on the Court's recognition that the Establishment Clause does comprehend such a principle and obligates the courts to exercise the judgment necessary to apply it.

*Id.*

233. *Id.* at 2494-95 (Blackmun, J., concurring) (citing *Lemon v. Kurtzman*, 403 U.S. 602 (1971)). No other Justices joined in Justice Blackmun's opinion.

234. *Id.* (Blackmun, J., concurring) Thus, Justice Blackmun stood in this, the last of his Establishment Clause decisions on the Court, as *Lemon's* lone adherent. *Id.* (Blackmun, J., concurring)

235. *Id.* at 2495 (Stevens, J., concurring). Justices Blackmun and Ginsburg joined in Justice Stevens' concurrence.

236. *Id.*

237. *Id.* For Justice Stevens, "[a]ction of that kind would raise no constitutional concerns and would further the strong public interest in promoting diversity and understanding in the public schools." *Id.*

238. *Id.*

239. *Id.*

was the central issue in *Grumet*: "What may the government do, consistently with the Establishment Clause, to accommodate people's religious beliefs?"<sup>240</sup>

Justice O'Connor's concurrence began with a catalogue of what she viewed as the Satmars' "three accommodation problems."<sup>241</sup> The first problem involved the City of Monroe's zoning laws, which did not permit the Satmars' unique living arrangements.<sup>242</sup> The neutral village incorporation law solved this problem by allowing the Village to incorporate.<sup>243</sup> The second problem involved providing government-funded special education to Satmar children.<sup>244</sup> The Monroe-Woodbury District's provision of the services at public schools solved this problem.<sup>245</sup> For Justice O'Connor, these situations represented how neutral laws can accommodate religious needs.<sup>246</sup> She emphasized how the zoning and special education problems initially were solved using neutral laws that gave similar rights to everyone and were, in the Satmars' case, used by a religious group to accommodate its needs.<sup>247</sup> The third accommodation problem evolved out of the effects of sending the Village children to public schools; addressing this problem led to Chapter 748 and the *Grumet* litigation.<sup>248</sup>

Justice O'Connor explained that a course of neutrality towards religion leads to an equal treatment of citizens regardless of their religious preferences.<sup>249</sup> "The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another," and thus, laws which classify based on religion must be evaluated with strict scrutiny.<sup>250</sup> Following this command results in an "emphasis on equal treatment" in Establishment Clause jurisprudence which, for Justice O'Connor, is "an eminently sound approach" to such cases.<sup>251</sup> According to Justice O'Connor, an unconstitutional infringement of the Establishment Clause exists when government makes "adherence to religion relevant to a person's standing in the political community."<sup>252</sup> Jus-

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240. *Id.* (O'Connor, J., concurring). No other Justices joined in Justice O'Connor's opinion.

241. *Id.*

242. *Id.* at 2495-96 (O'Connor, J., concurring).

243. *Id.* at 2496 (O'Connor, J., concurring).

244. *Id.*

245. *Id.*

246. *Id.*

247. *Id.*

248. *Id.*

249. *Id.* at 2497 (O'Connor, J., concurring).

250. *Id.* (quoting *Larson v. Valente*, 456 U.S. 228, 244 (1982)).

251. *Id.*

252. *Id.* (quoting *Wallace v. Jaffree*, 472 U.S. 38, 69 (1985) (O'Connor, J., concurring)).

tice O'Connor then related this rule back to the notion of accommodation by asserting that "[a]ccommodations may thus justify treating those who share this belief differently from those who do not; but they do not justify discriminations based on sect."<sup>253</sup> Accordingly, for Justice O'Connor, Chapter 748 did not represent a permissible accommodation of the Satmars' unique needs because it amounted to discriminatory treatment of the Satmars based on their religion.

Justice O'Connor next emphasized the alternatives available to New York for accommodating the Satmars and any other similarly situated communities.<sup>254</sup> New York could pass a neutral law that allowed all villages to form their own school districts or it could promulgate neutral criteria that a village would be required to meet in order to form its own school district.<sup>255</sup> Another alternative presented by Justice O'Connor was for the Court to reconsider *Aguilar v. Felton*<sup>256</sup> and allow government-funded special education to be provided on nonpublic religious school grounds.<sup>257</sup> *Aguilar's* disapproval of such a scheme, for Justice O'Connor, represented government hostility towards religion which, as a result, led New York to favor religion by enacting Chapter 748.<sup>258</sup>

Next, Justice O'Connor turned to the fact that the Court did not base its holding on the *Lemon* test.<sup>259</sup> She expressed her aversion to the Court's post-*Lemon* efforts to awkwardly shoehorn new Establishment Clause issues into the confines of the *Lemon* test.<sup>260</sup> Instead of remain-

253. *Id.* "The Constitution permits 'nondiscriminatory religious-practice exemption[s], not sectarian ones.'" *Id.* (quoting Employment Div. Dep't of Health Resources v. Smith, 494 U.S. 872, 890 (1990) (O'Connor, J., concurring)). To illustrate this point, Justice O'Connor used the example that while the exemption of sacramental wines from a prohibition law is a permissible accommodation, exemption of sacramental wines of Catholics only is not permissible. *Id.*

254. *Id.* at 2498 (O'Connor, J., concurring).

255. *Id.* The latter alternative could "be applied by a state agency, and the decision would then be reviewable by the judiciary." *Id.* For Justice O'Connor, *Grumet* would not invalidate a district created under such generally applicable schemes. *Id.*

256. 473 U.S. 402 (1985).

257. *Grumet*, 114 S. Ct. at 2498 (O'Connor, J., concurring); see *supra* notes 51-57 and accompanying text.

258. *Grumet*, 114 S. Ct. at 2498 (O'Connor, J., concurring). "The court should, in a proper case, be prepared to reconsider *Aguilar*, in order to bring our Establishment Clause jurisprudence back to what I think is the proper track—government impartiality, not animosity, towards religion." *Id.* Justice O'Connor dissented in *Aguilar v. Felton*, 473 U.S. 373, 421 (1985) (O'Connor, J., dissenting).

259. *Grumet*, 114 S. Ct. at 2498 (O'Connor, J., concurring).

260. *Id.* at 2498-99 (O'Connor, J., concurring). She admitted that a "Grand Unified



ing attached to *Lemon*, Justice O'Connor advocated that the Court should take "a less unitary" approach to Establishment Clause cases that would allow the Court to derive multiple "narrow tests" which could be applied in different Establishment Clause issue categories.<sup>261</sup> Each category of Establishment Clause cases, such as "government speech on religious topics" or "government . . . decisions about matters of religious doctrine or law," would be governed by those principles unique to the interests at stake and be judged under an appropriate, more narrow, test.<sup>262</sup> Finally, Justice O'Connor emphasized that the use of a narrower test would both lead to more consensus among the Justices and avoid abandonment of the insights gleaned from *Lemon's* previous applications.<sup>263</sup> In Justice O'Connor's opinion, if the Establishment Clause were freed from *Lemon's* confines, "[t]he hard questions would, of course, still have to be asked; but they [would] be asked within a more carefully tailored and less distorted framework."<sup>264</sup>

#### E. Justice Kennedy's Concurrence

Justice Kennedy wrote separately to express his support for the Court's result and to explain the "narrower theory" upon which his decision rested.<sup>265</sup> The Court's opinion, according to Justice Kennedy, "can be interpreted to say that an accommodation for a particular religious group is invalid because of the risk that the legislature will not grant the same accommodation to another religious group suffering some similar burden."<sup>266</sup> For Justice Kennedy, this interpretation lacked support in the Court's precedents and represented "a needless restriction upon the legislature's ability to respond to the unique problems of a particular religious group."<sup>267</sup> Rather, for Justice Kennedy, Chapter 748 was uncon-

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Theory" for all Establishment Clause cases is appealing; however, "[a]ny test that must deal with widely disparate situations risks being so vague as to be useless." *Id.* at 2499 (O'Connor, J., concurring). *Lemon*, for Justice O'Connor, has achieved such vagueness. *Id.* Justice O'Connor then catalogued the oddities of *Lemon* jurisprudence to point out its vagueness and the anomalous results it produced. *Id.*

261. *Id.* at 2500 (O'Connor, J., concurring).

262. *Id.* at 2499-500 (O'Connor, J., concurring). Justice O'Connor also identified "[g]overnment delegations of power to religious bodies" as another category and she observed that "there may well be additional categories, or more opportune places to draw the lines between the categories." *Id.* at 2500 (O'Connor, J., concurring).

263. *Id.* at 2500 (O'Connor, J., concurring).

264. *Id.*

265. *Id.* at 2500-01 (Kennedy, J., concurring). No other Justices joined in Justice Kennedy's concurrence.

266. *Id.*

267. *Id.* at 2501 (Kennedy, J., concurring). Justice Kennedy did not cite the cases to which he referred. *Id.*

stitutional because New York impermissibly drew a political boundary based on religion.<sup>268</sup>

The concurrence emphasized that it was not the accommodation of the Satmar children's special needs that resulted in Chapter 748's unconstitutionality.<sup>269</sup> Rather, the problem with Chapter 748 was grounded in the "fundamental limitation" on governmental accommodation of religion that "government may not use religion as a criterion to draw political or electoral lines."<sup>270</sup> Justice Kennedy found that since "the New York legislature knew that everyone within the Village was Satmar when it drew the school district along the village lines, and it determined who was to be included in the district by imposing, in effect, a religious test," Chapter 748 violated the Establishment Clause.<sup>271</sup> According to Justice Kennedy, the New York legislature's actions represented "explicit religious gerrymandering."<sup>272</sup>

268. *Id.*

269. *Id.* Justice Kennedy explained that it was not the existence of the Kiryas Joel District that violated the Constitution, but rather "the forbidden manner in which the New York Legislature sought to go about" creating it. *Id.* (Kennedy, J., concurring). Justice Kennedy then catalogued the history of accommodation of religious practices in the United States. *Id.* (Kennedy, J., concurring). Furthermore, because Chapter 748 was designed to "alleviate a specific burden on the Satmars' religious practice," which New York was entitled to do, it "did not impose or increase any burden on non-Satmars, compared to the burden it lifted from the Satmars," did not "favor the Satmar religion to the exclusion of any other," and because any future failures of New York to accommodate similar religious needs could be judicially challenged, the Kiryas Joel District did "not suffer any of the typical infirmities that might invalidate an attempted legislative accommodation." *Id.* at 2502-03 (Kennedy, J., concurring).

270. *Id.* at 2504 (Kennedy, J., concurring).

271. *Id.*

272. *Id.* Justice Kennedy distinguished between the creation of the Kiryas Joel District and the incorporation of the Village itself. *Id.* The key difference was that "the village was formed pursuant to a religion-neutral self-incorporation scheme," under which Monroe had no substantive discretion to reject the request for incorporation. *Id.* Alternatively, the Kiryas Joel District was created by a discretionary act of the New York legislature, which thus "had a direct hand in accomplishing the religious segregation." *Id.* Justice Kennedy also emphasized that the Establishment Clause does not prevent boundaries to be drawn based on neutral criteria where the result is a religiously homogeneous population. *Id.* at 2504-05 (Kennedy, J., concurring). However, Chapter 748 did not represent boundaries drawn based on neutral criteria, but rather "forced separation that occurs when the government draws explicit political boundaries on the basis of people's faith." *Id.* at 2505 (Kennedy, J., concurring). Justice Kennedy also observed that "[t]he danger of stigma and stirred animosities is no less acute for religious line-drawing than for racial." *Id.* at 2503 (Kennedy, J., concurring).

Finally, Justice Kennedy observed that *Grumet* was an unusual case because the problem that Chapter 748 sought to solve was “attributable, in no small measure to . . . unfortunate rulings by this Court.”<sup>273</sup> Justice Kennedy concluded that the Court’s “decisions in [*Board of Education of the City of Grand Rapids* and *Aguilar* may have been erroneous” because neutral aid schemes, available to all students regardless of where they attended school, are preferable ways to deal with problems like those experienced by the Satmar children than are statutes like Chapter 748.<sup>274</sup> The error of those decisions, however, could not be compounded with a similar holding in *Grumet*.<sup>275</sup> “We must confront this case as it comes before us, without bending rules to free the Satmars from a predicament into which we put them.”<sup>276</sup> Thus, because Chapter 748 drew political boundaries based on religion, in Justice Kennedy’s opinion, it violated the Establishment Clause.<sup>277</sup>

#### F. Justice Scalia’s Dissent

“The Court today finds that the Powers That Be, up in Albany, have conspired to effect an establishment of the Satmar Hasidim.”<sup>278</sup> With this opening shot, Justice Scalia began his dissent, in which he argued that the plurality had discarded the text and history of the Establishment Clause and labeled “religious toleration” an establishment of religion.<sup>279</sup>

Justice Scalia characterized the Kiryas Joel District as purely public in nature, with only the fact that all of its students are members of the same religion distinguishing it from other public school districts.<sup>280</sup> As such, Justice Scalia stated that the Court’s precedent did not prohibit such a district and, in fact, “the Court has specifically approved the edu-

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273. *Id.* at 2505 (Kennedy, J., concurring). Justice Kennedy then recounted the history leading up to Chapter 748, emphasizing how the *Aguilar v. Felton*, 473 U.S. 402 (1985), and *School District of the City of Grand Rapids v. Ball*, 473 U.S. 373 (1985), rulings forced the Monroe-Woodbury District to abandon its program of providing the special services at the Kiryas Joel religious schools. *Id.*

274. *Id.*

275. *Id.*

276. *Id.*

277. *Id.*

278. *Id.* at 2505-06 (Scalia, J., dissenting).

279. *Id.* at 2506 (Scalia, J., dissenting). Chief Justice Rehnquist and Justice Thomas joined in Justice Scalia’s dissenting opinion.

280. *Id.* Justice Scalia noted that the school operated by the Kiryas Joel District provided secular education, was run by a superintendent who was not a Satmar, was staffed by employees who do not live in the Village, conducted co-ed classes, and complied with the same rules that governed all New York public schools. *Id.* Additionally, Justice Scalia pointed out that no allegations were made “that this public school has gone too far in making special adjustments to the religious needs of its students.” *Id.*

cation of students of a single religion on a neutral site adjacent to a private religious school."<sup>281</sup> Justice Scalia reasoned that because the Court previously approved that kind of measure, providing such education at a public school must also be permissible.<sup>282</sup>

Next, Justice Scalia took issue with Justice Souter's opinion.<sup>283</sup> First, Justice Scalia rejected Justice Souter's conclusion that the delegation of civil authority to a church, like that involved in the *Larkin* case, is the same as choosing a group based on cultural characteristics, like that involved in *Grumet*.<sup>284</sup> Justice Scalia contended that if Justice Souter's equation of civil authority held by a church with civil authority held by citizens who are members of the same church was accepted, "one must believe that large portions of the civil authority exercised during most of [United States] history were unconstitutional."<sup>285</sup> Justice Scalia characterized Justice Souter's opinion as holding that groups of citizens cannot be vested with political power if they are members of the same religion.<sup>286</sup> Justice Scalia rejected this approach as "antagonistic to the purposes of the Religion Clauses."<sup>287</sup>

Evaluating Justice Souter's contention that religion motivated the Kiryas Joel District's creation, Justice Scalia contended that such an allegation, made by an unelected judge, cannot void democratically enacted laws without being accompanied by a showing that no neutral, secular basis existed for the law.<sup>288</sup> Justice Scalia had "no possible

281. *Id.* (citing *Wolman v. Walter*, 433 U.S. 229, 247-48 (1977)). Also, Justice Scalia recalled *Zobrest v. Catalina Foothills School District*, 113 S. Ct. 2462 (1993), in which the Court permitted a public employee to assist a student attending a Catholic school. *Grumet*, 114 S. Ct. at 2506 (Scalia, J., dissenting) (citing *Zobrest*, 113 S. Ct. at 2469).

282. *Grumet*, 114 S. Ct. at 2506 (Scalia, J., dissenting).

283. *Id.* at 2506-07 (Scalia, J., dissenting); see *supra* notes 203-32 and accompanying text.

284. *Grumet*, 114 S. Ct. at 2507 (Scalia, J., dissenting).

285. *Id.* Justice Scalia characterized the history of the settling of North America as "the story of groups of people sharing a common religious and cultural heritage striking out to form their own communities." *Id.*

286. *Id.* at 2508 (Scalia, J., dissenting).

287. *Id.* Furthermore, Justice Scalia rejected Justice Souter's attempt to limit his finding of unconstitutionality of conferring civil authority upon members of the same religion to the unique facts surrounding Chapter 748's enactment. *Id.* These facts "have nothing to do with whether conferral of power upon a group of citizens can be the conferral of power upon a religious institution. It can not. Or if it can, our Establishment Clause jurisprudence has been transformed." *Id.*

288. *Id.* (Scalia, J., dissenting) (citing *Gillette v. United States*, 401 U.S. 437, 452

doubt" that Chapter 748 rested upon a secular basis.<sup>289</sup> This secular basis was the New York Legislature's desire to provide the Village's disabled students with the services to which they were entitled without subjecting them to the trauma they encountered at public schools outside the Village.<sup>290</sup> Justice Scalia observed that the incorporation of the Village resulted from the Satmars' unique zoning needs and that all persons except Satmars were excluded from the Village, not because of their religion, but because they did not share the Satmars' desire for high-density zoning.<sup>291</sup> Because the Village emerged from these "secular governmental desires," the fact that the Village amounted to a "political unit whose members shared the same religion" could not legitimately be used to show that the Kiryas Joel District was created based on religion.<sup>292</sup> However, Justice Scalia asserted that Justice Souter's opinion utilized this faulty connection.<sup>293</sup>

"[E]ven if Chapter 748 were intended to create a special arrangement for the Satmars because of their religion (not including . . . any conferral of governmental power upon a religious entity) it would be a permissible accommodation."<sup>294</sup> Justice Scalia stated that the Establishment Clause permits accommodation, even if a statute is based on religion, and even

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(1971)).

289. *Id.* at 2509 (Scalia, J., dissenting).

290. *Id.* Justice Scalia went on to reject what he saw as the three reasons why Justice Souter found that religious preference prompted the enactment of Chapter 748. *Id.*; see *supra* notes 203-32 and accompanying text. First, Justice Scalia stated that the enactment of Chapter 748 was not done in a special manner, atypical of New York's usual creation of public school districts. *Grumet*, 114 S. Ct. at 2509 (Scalia, J., dissenting). Second, since the Kiryas Joel District was not created in an extraordinary manner, its creation could not have contradicted New York's trend of consolidating districts. *Id.* Third, Justice Scalia stated that just because all members of the Kiryas Joel District were Satmars, there was no basis for Justice Souter's conclusion that Chapter 748 was enacted based on the Satmars' religious rather than cultural distinctiveness. *Id.* at 2510 (Scalia, J., dissenting). Justice Scalia characterized this assumption by Justice Souter as "a novel Establishment Clause principle to the effect that no secular objective may be pursued by a means that might also be used for religious favoritism if some other means [to meet the students' special needs] is available." *Id.* For Justice Scalia, the fact that the Satmars' distinctiveness is based on their religion subjected them to a disadvantage in Justice Souter's analysis, which would have allowed a district such as the Kiryas Joel District to be created if the distinctiveness requiring special treatment was nonreligious. *Id.* According to Justice Scalia, such a disadvantage is not sanctioned by the Establishment Clause. *Id.* (Scalia, J., dissenting) (citing *McDaniel v. Paty*, 435 U.S. 618, 641 (1977) (Brennan, J., concurring)).

291. *Id.* at 2511 (Scalia, J., dissenting).

292. *Id.*

293. *Id.*

294. *Id.*

when the Free Exercise Clause does not require accommodation.<sup>295</sup> Justice Scalia then catalogued the United States' history of accommodating religion.<sup>296</sup> According to Justice Scalia, Justice Souter's opinion failed to acknowledge that the Court has not held that delegation of civil authority to citizens who share the same religion is unconstitutional.<sup>297</sup> Justice Scalia then rebutted Justice Souter's reason that Chapter 748 represented an impermissible accommodation—the absence of any guarantee of neutrality in conferring such civil authority.<sup>298</sup> According to Justice Scalia, “courts cannot escape the obligation” to hear other groups' future pleas for New York to neutrally allocate power.<sup>299</sup> Finally, Justice Scalia reiterated his opinion that the Establishment Clause prohibits laws that favor one religion over another.<sup>300</sup> What he objected to about the Court's decision was, instead, its “novel ‘up front’ procedural requirements on state legislatures” to guarantee similar treatment of all similar religious or secular groups.<sup>301</sup>

Justice Scalia characterized Justice Stevens' concurrence as “less a legal analysis than a manifesto of secularism” because of its concern that the Kiryas Joel District would help parents cement their children's religious beliefs.<sup>302</sup> For Justice Scalia, Justice Stevens' analysis would forbid “any state action that incidentally helps parents to raise their children in their own religious faith,” and, in doing so, “surpasses a mere rejection of accommodation, and announces a positive hostility to reli-

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295. *Id.*

296. *Id.* at 2511-12 (Scalia, J., dissenting).

297. *Id.* at 2512 (Scalia, J., dissenting).

298. *Id.* at 2513 (Scalia, J., dissenting).

299. *Id.* Justice Scalia argued that Justice Souter's assertion that neutrality must be guaranteed “up front” ran contrary to “both traditional accommodation and the judicial role.” *Id.* (Scalia, J., dissenting) (citing *Church of Lukumi Babalu Aye v. Hialeah*, 113 S. Ct. 2217, 2241 n.2 (Souter, J., concurring); *Oregon Dept. of Human Resources v. Smith*, 949 U.S. 872, 890 (1990)).

300. *Id.* at 2514 (Scalia, J., dissenting).

301. *Id.*

302. *Id.* Justice Scalia referred to Justice Stevens' assertion that the continued isolation of the Satmar students would, while protecting them from the trauma experienced when attending public schools, “unquestionably” increase the odds of those children remaining faithful to the Satmar faith. *Id.* (quoting *id.* at 2495 (Stevens, J., concurring)). According to Justice Scalia, this contention is contrary to the Court's holding in *Zorach v. Clauson*, 343 U.S. 306 (1952), in which the Court upheld “a program permitting public school children to attend the religious-instruction program of their parents' choice.” *Grumet*, 114 S. Ct. at 2514 (Scalia, J., dissenting) (citing *Zorach*, 343 U.S. at 315).

gion—which, unlike other noncriminal values, the state must not assist parents in transmitting to their offspring.”<sup>303</sup>

Regarding Justice Kennedy’s concurrence, Justice Scalia could not agree with Justice Kennedy’s findings that while the creation of the Village was constitutional because it was accomplished under a generally applicable law, the creation of the Kiryas Joel District was unconstitutional because it was accomplished pursuant to a specific legislative act.<sup>304</sup> Justice Scalia found that this distinction did not amount to the creation of a constitutional defect.<sup>305</sup>

Justice Scalia joined in the chorus sung by Justices O’Connor and Kennedy’s concurrences calling for the reexamination of the *Grand Rapids* and *Aguilar* decisions.<sup>306</sup> Justice Scalia stated that these cases “should be overruled at the earliest opportunity.”<sup>307</sup>

Finally, Justice Scalia turned to the Court’s “snub” of the *Lemon* test.<sup>308</sup> He emphasized that the three lower courts relied on *Lemon* in coming to their decisions and that the parties spent over eighty pages briefing the case under the *Lemon* framework or calling for its abandonment.<sup>309</sup> “It seems quite inefficient for this Court, which in reaching its decisions relies heavily on the briefing of the parties and, to a lesser extent, the opinions of the lower courts, to mislead lower courts and parties about the relevance of the *Lemon* test.”<sup>310</sup> Justice Scalia stated that, in *Lemon*’s place, “[t]he foremost principle [he] would apply is fidelity to the longstanding traditions of our people.”<sup>311</sup>

## V. IMPACT

### A. Judicial Impact

*Board of Education of Kiryas Joel Village School District v. Grumet*’s impact on Establishment Clause jurisprudence is twofold. First, the Justices’ opinions modified previous Establishment Clause tests and created a new test. This represents a significant shift in the various modes of analysis the Justices bring to Establishment Clause cases. The

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303. *Grumet*, 114 S. Ct. at 2514 (Scalia, J., dissenting).

304. *Id.*

305. *Id.*

306. *Id.* at 2514-15 (Scalia, J., dissenting) (citing *School Dist. of Grand Rapids v. Ball*, 473 U.S. 373 (1985); *Aguilar v. Felton*, 473 U.S. 402 (1985)).

307. *Id.* at 2515 (Scalia, J., dissenting).

308. *Id.*

309. *Id.*

310. *Id.*

311. *Id.* Justice Scalia rejected Justice O’Connor’s call for the announcement of several new tests and asserted that his historical approach would “surely provide the diversity of treatment that Justice O’Connor seeks.” *Id.*

Establishment Clause Approaches sub-section examines the different tests used by the Justices in *Grumet* and explores how the tests were modified from previous formulations or created anew.<sup>312</sup> In addition, that sub-section speculates as to how the tests will be applied in future cases.<sup>313</sup> Second, because it brought about these changes in the Court's analysis, *Grumet* will change the future course of the lines of cases which were explored in the Historical Background section. The Impact on Establishment Clause Caselaw sub-section will analyze how these lines of precedent will evolve in the future as a result of *Grumet*.<sup>314</sup>

### 1. Establishment Clause Approaches

The Court's refusal in *Grumet* to expressly apply or abandon the *Lemon* test as the principal Establishment Clause test, coupled with the Court's inability to present a new Establishment Clause approach upon which a majority of Justices could agree leaves the Court with an increasingly long list of Establishment Clause approaches, none of which seem to be satisfactory for a majority of Justices in a majority of Establishment Clause cases.<sup>315</sup> The *Grumet* opinions dramatically altered this list of approaches, and this sub-section will analyze the tests created, changed, and abandoned by the Court in *Grumet*.

#### a. The Endorsement Test

In her concurring opinion in *Lynch v. Donnelly*,<sup>316</sup> Justice O'Connor presented her endorsement test, which she labeled a clarification of the *Lemon* test.<sup>317</sup> The principle at the heart of the Establishment Clause,

312. See *infra* notes 315-99 and accompanying text.

313. See *infra* notes 310-415 and accompanying text.

314. See *infra* notes 416-46 and accompanying text.

315. For example, in *Marsh v. Chambers*, the Court applied the history test and concluded that a state legislature's opening of each session with a prayer given by a publicly-paid chaplain was sufficiently grounded in historical practice to pass constitutional muster. 463 U.S. 783, 795 (1983). Justices Rehnquist and O'Connor joined in the Court's *Marsh* opinion; however, only Chief Justice Rehnquist continues to follow a primarily history-based approach. See *Grumet*, 114 S. Ct. at 2495-2500 (O'Connor, J., concurring) (advocating multiple Establishment Clause tests); *id.* at 2505-16 (Rehnquist, C.J., joining Justice Scalia's dissenting opinion) (advocating a historical approach).

316. 465 U.S. 668 (1984).

317. *Id.* at 689 (O'Connor, J., concurring). Justice O'Connor felt that her analysis "clarifie[d] the *Lemon* test as an analytical device." *Id.*; see *Wallace v. Jaffree*, 472



she stated, was to prohibit the government from "making adherence to a religion relevant in any way to a person's standing in the political community."<sup>318</sup> This principle is violated when government becomes excessively entangled with religious institutions or when government endorses or disapproves of religion.<sup>319</sup> "Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community."<sup>320</sup> With this principle in mind, Justice O'Connor explained that her endorsement test would modify the first and second *Lemon* prongs<sup>321</sup> to ask, respectively, "whether government's actual purpose is to endorse or disapprove of religion" and "whether, irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval."<sup>322</sup>

Later, in *Wallace v. Jaffree*,<sup>323</sup> Justice O'Connor explained how the mechanics of the endorsement test could be modified in cases where the Court sought to accommodate citizens' free exercise of religion consistently with the Establishment Clause.<sup>324</sup> In a case where a government

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U.S. 38, 69 (1985) (O'Connor, J., concurring) (referring to the endorsement test as a "refinement of the *Lemon* test"); Conkle, *supra* note 31, at 879 (referring to the endorsement test as a "modification" of the *Lemon* test). For commentary on the endorsement test see Donald L. Beshle, *The Conservative as Liberal: The Religion Clauses, Liberal Neutrality, and the Approach of Justice O'Connor*, 62 NOTRE DAME L. REV. 151 (1987) (arguing for adherence to the principle of liberal neutrality in Establishment Clause decision making and suggesting that such a principle is better served by an approach similar to Justice O'Connor's rather than the Court's traditional focus on the preservation of separation of church and state); Arnold H. Loewy, *Rethinking Government Neutrality Towards Religion Under the Establishment Clause: The Untapped Potential of Justice O'Connor's Insight*, 64 N.C. L. REV. 1049 (1986) (praising Justice O'Connor's move towards the prohibition of governmental endorsement or disapproval of religion as the correct Establishment Clause test, and suggesting that serious adherence to this principle is proper, but would require a dramatic shift in the Court's jurisprudence that it is probably not prepared to undertake); W. Scott Simpson, *Lemon Reconstituted: Justice O'Connor's Proposed Modifications of the Lemon Test for Establishment Clause Violations*, 1986 B.Y.U. L. REV. 465 (1986) (explaining how Justice O'Connor's endorsement test changed and improved the first two prongs of the *Lemon* test).

318. *Lynch*, 465 U.S. at 687 (O'Connor, J., concurring).

319. *Id.* at 687-88 (O'Connor, J., concurring).

320. *Id.* at 688 (O'Connor, J., concurring).

321. See *supra* note 34 and accompanying text.

322. *Lynch*, 465 U.S. at 690 (O'Connor, J., concurring).

323. 472 U.S. 38 (1985).

324. *Id.* at 83 (O'Connor, J., concurring). "[T]his 'accommodation' analysis would help reconcile our Free Exercise and Establishment Clause standards . . . ." *Id.* Justice O'Connor offered this modification of her endorsement test as an alternative to the "neutrality" approach to reconciling the two religion clauses that the Court histor-

act "lifts a government-imposed burden on the free exercise of religion . . . the Court should simply acknowledge that the religious purpose of such a statute is legitimated by the Free Exercise Clause."<sup>325</sup> Hence, the first endorsement clause inquiry—whether the government intended to endorse religion—is not fatal to government laws motivated by religious concerns, as long as those concerns spring from the government's desire to accommodate the free exercise of religion.<sup>326</sup> The second part of the endorsement test analysis—whether the government activity endorsed or disapproved of religion—is modified to weigh the value of the free exercise claim against the offensiveness of the endorsement perceived by an objective observer.<sup>327</sup> This objective observer is charged with knowledge of "the Free Exercise Clause and the values it promotes."<sup>328</sup> The modified second endorsement test inquiry, then, accounts for the conflict between the Free Exercise and Establishment Clauses in cases which implicate both clauses. Thus, Justice O'Connor's endorsement test changed *Lemon's* perspective<sup>329</sup> and provided a framework within which Free Exercise and Establishment Clause concerns could be reconciled.

Despite her discussion of *Grumet* as a case which arose from the Village's struggle for accommodation of its religious beliefs,<sup>330</sup> Justice O'Connor did not apply the modified-for-accommodation version of her endorsement test to the case.<sup>331</sup> Instead, Justice O'Connor backed down from her previous search for a single principle against which to judge

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ically used. *Id.* at 82-84 (O'Connor, J., concurring); see also *supra* notes 109-11 and accompanying text (noting the nature of the conflict between the two religion clauses).

325. *Wallace*, 472 U.S. at 83 (O'Connor, J., concurring).

326. "It is disingenuous to look for a purely secular purpose when the manifest objective of a statute is to facilitate the free exercise of religion by lifting a government-imposed burden." *Id.*

327. *Id.* "Thus individual perceptions, or resentment that a religious observer is exempted from a particular government requirement, would be entitled to little weight if the Free Exercise Clause strongly supported the exemption." *Id.*

328. *Id.*

329. See Lewis & Vild, *supra* note 142, at 673-88 (charting the evolution and adoption by the Court of the endorsement test as a modification of *Lemon*); Underwood, *supra* note 25, at 56 (noting that, after *Lynch*, the Court consistently applied the endorsement test in cases dealing with kindergarten through twelfth grade education issues).

330. Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet, 114 S. Ct. 2481, 2495-96 (1994) (O'Connor, J., concurring).

331. *Id.*

Establishment Clause cases,<sup>332</sup> like her endorsement test, and suggested that each kind of Establishment Clause case may call for the application of unique principles and tests.<sup>333</sup> Justice O'Connor's failure to apply the endorsement test, coupled with her call for the development of several specialized tests, is a notable development in her Establishment Clause jurisprudence and may reflect two realities.

The first reality is that the Court, as evidenced by its previous failures, simply may never be able to consistently agree on a single Establishment Clause test.<sup>334</sup> By calling on the Court to develop a "less unitary approach" in light of the tendency of generalized tests, such as *Lemon*, to produce worse rather than better decisions,<sup>335</sup> Justice O'Connor suggested that the search for a single Establishment Clause test may, ironically, be responsible for the Court's inability to devise a single approach to Establishment Clause cases.<sup>336</sup> Thus, her opinion represents an acknowledgment that a single test, whether *Lemon*, endorsement, or any other test, may not be workable in the near future and, hence, the Court ought to search elsewhere for an effective approach to the Establishment Clause.

The second reality stems from the fact that Justice O'Connor did not apply her endorsement test in *Grumet*.<sup>337</sup> Instead, she focused on whether the government distributed benefits based on religion to the potential exclusion of other groups.<sup>338</sup> Thus, Justice O'Connor implicitly acknowledged that her endorsement test, like *Lemon* or any other test, is not appropriate for all Establishment Clause cases. She instead called for

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332. "[O]ur goal should be 'to frame a principle for constitutional adjudication that is not only grounded in the history and language of the first amendment, but one that is also capable of consistent application to the relevant problems.'" *Wallace*, 472 U.S. at 69 (O'Connor, J., concurring) (quoting Jesse H. Choper, *Religion in the Public Schools: A Proposed Constitutional Standard*, 47 MINN. L. REV. 329, 332-33 (1963)).

333. *Grumet*, 114 S. Ct. at 2498-99 (O'Connor, J., concurring); see Petitioner Board of Education of the Monroe-Woodbury Central School District's Brief at 46, Board of Educ. of Kiyas Joel Village Sch. Dist. v. *Grumet*, 114 S.Ct. 2481 (1994) (Nos. 93-517, 93-527 & 93-539) (suggesting that the Court should "revisit the issue whether any one specific test can fairly assess the constitutionality of such as broad range of activities or whether a series of more program or activity-specific tests should be formulated").

334. See *Grumet*, 114 S. Ct. at 2500 (O'Connor, J., concurring) (stating that with the use of multiple Establishment Clause cases, "[t]here might also be, I hope, more consensus on each of the narrow tests than there has been on a broad test").

335. *Id.* at 2498-99 (O'Connor, J., concurring). "[T]he bad test may drive out the good. Rather than taking the opportunity to derive narrower, more precise tests . . . courts tend to continually try to patch up the broad test, making it more and more amorphous and distorted. This, I am afraid, has happened with *Lemon*." *Id.* at 2499 (O'Connor, J., concurring).

336. *Id.* at 2498-99 (O'Connor, J., concurring).

337. *Id.* at 2495-2500 (O'Connor, J., concurring).

338. *Id.* at 2497-98 (O'Connor, J., concurring).

a new approach to this area of law—the “less unitary approach”—in an effort to try to move the Court away from its futile search for the “Grand Unified Theory” of the Establishment Clause.<sup>339</sup> In doing so, Justice O'Connor broadened the focus of her own Establishment Clause jurisprudence, probably in an attempt to persuade the Court to shift its focus away from *Lemon* or any other single test, and towards a more workable and scrutable Establishment Clause jurisprudence.

#### b. *The Fusion Test*

In *Grumet*, Justice Souter's analysis applied what this article refers to as the “fusion test” to Chapter 748.<sup>340</sup> Justice Souter did not adhere to any previously-derived Establishment Clause test to decide *Grumet* and, instead, based his findings largely on the similarities between *Larkin v. Grendel's Den, Inc.*<sup>341</sup> and *Grumet*.<sup>342</sup> Justice Souter noted that the *Larkin* Court found that the law at issue ran afoul of the Establishment Clause because it did not preserve for the state a neutral relationship with religion.<sup>343</sup> It was the fusion of state and religious functions caused by the law at issue in *Larkin* that violated the neutrality principle.<sup>344</sup> The fusion test evolved from this analysis.

Justice Souter's invocation of the Court's threshold requirement that government remain neutral towards religion was not at all extraordinary.<sup>345</sup> The Court, in fact, has used neutrality as a basic principle over

339. *Id.* at 2498-99 (O'Connor, J., concurring).

340. Justice Souter did not label his analysis as the fusion test. Rather, this Note refers to the standard for judgment provided in the section of Justice Souter's opinion in which he discussed the notion of impermissible fusion as the fusion test.

341. 459 U.S. 116 (1982); see *supra* notes 123-31 accompanying text.

342. *Grumet*, 114 S. Ct. at 2487-90. In his tenure on the Court, Justice Souter has written only one other Establishment Clause opinion, a concurring opinion in *Lee v. Weisman*, 112 S. Ct. 2649, 2667 (1992) (Souter, J., concurring). In that opinion, Justice Souter, joined by Justices Stevens and O'Connor, argued that the history of the Establishment Clause mandates not only governmental neutrality between religions, but also neutrality between religion and nonreligion. *Id.* at 2668 (Souter, J., concurring).

343. *Grumet*, 114 S. Ct. at 2488.

344. *Id.* at 2487-88.

345. *Id.*; see *Zobrest v. Catalina Foothills Sch. Dist.*, 113 S. Ct. 2462, 2466-67 (1993) (applying the principle that neutrally provided government benefits to religious school students are not prohibited by the Establishment Clause); *Bowen v. Kendrick*, 487 U.S. 589, 608 (1988) (finding flawed, while conducting a *Lemon* test analysis, a statute that did not confer authority in a religiously-neutral manner); *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 125 (1982) (finding, within the Court's analysis of *Lemon's* second prong, that any governmental authority conferred on a religious group would

which a number of tests have been applied in Establishment Clause cases.<sup>346</sup> Furthermore, Justice Souter stated that *Larkin* stood for the principle that a "fusion" of state and religious powers is prohibited by the Establishment Clause because that fusion leads to the excessive entanglement of government and religion.<sup>347</sup> While this concern over excessive entanglement is essentially the third *Lemon* prong,<sup>348</sup> Justice Souter's analysis of *Grumet* only offered entanglement as a justification for the Establishment Clause's prohibition of fusion of state and religious functions.<sup>349</sup> Thus, Justice Souter's opinion, while discussing neutrality and *Lemon*'s third prong, is not unique because of its contribution to those doctrines.<sup>350</sup> Instead, Justice Souter tied his analysis securely to the fusion notion and, therefore, his opinion represents the first formulation of the fusion test.

The fusion test embodies the union of two strands of Establishment Clause logic from the Court's previous cases, combined with the notion that government may not delegate its power to religious groups on the basis of religion. In *School District of Abington v. Schempp*,<sup>351</sup> Justice Clark, writing for the majority, explained that the Court's traditional concern for governmental neutrality towards religion "stems from a recognition of the teachings of history that powerful sects or groups might bring about a fusion of governmental and religious functions . . . to the end that official support of the State . . . would be placed behind the

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have to be neutrally employed); Committee for Pub. Educ. and Religious Liberty v. Nyquist, 413 U.S. 756, 792-93 (1973) (recognizing the importance of neutrality in Establishment Clause analysis in the course of the Court's application of the *Lemon* test); Walz v. Tax Comm'n, 397 U.S. 664, 676-77 (1970) (applying the principle of "benevolent neutrality"); School Dist. of Abington Township v. Schempp, 374 U.S. 203, 222 (1963) (cataloging the "wholesome 'neutrality' of which this Court's cases speak" and using that analysis to reach a decision); Everson v. Board of Educ., 330 U.S. 1, 18 (1947) (applying the principle that the Establishment Clause requires governmental neutrality, not hostility, towards religion).

346. *Grumet*, 114 S. Ct. at 2487-88.

347. *Id.* at 2488 (quoting *Larkin*, 459 U.S. at 126).

348. See *supra* note 34 and accompanying text.

349. *Grumet*, 114 S. Ct. at 2488.

350. Justice Souter also relied on the absence of any guarantee that New York would afford similar treatment to other groups like that afforded the Satmars by Chapter 748. *Id.* at 2488. This concern also stemmed from his broader concern for neutrality. *Id.* at 2489. However, this reason is given as an additional or supportive factor which contributed to the finding of Chapter 748's unconstitutionality, with the fusion problem remaining foremost in Justice Souter's analysis. *Id.* Chapter 748 violated the Establishment Clause "by delegating the State's discretionary authority over public schools to a group defined by its character as a religious community, in a legal and historical context that gives no assurance that governmental power has been or will be exercised neutrally." *Id.* at 2487.

351. 374 U.S. 203 (1963).

tenets of one or of all orthodoxies.<sup>352</sup> Later, in *Larkin*, concluding its analysis of the case based on the *Lemon* test, the Court stated that Establishment Clause precedent connotes that "the core rationale underlying the Establishment Clause is preventing 'a fusion of governmental and religious functions.'"<sup>353</sup> To fortify the fusion test's legitimacy, Justice Souter added to this fusion rhetoric by noting the existence of Establishment Clause precedent that teaches that government cannot delegate its power to or participate in the affairs of a religious group.<sup>354</sup>

So how does the fusion test work? In his analysis of why Chapter 748 represented an impermissible fusion of governmental and religious authority, Justice Souter framed his fusion analysis as an assessment of whether civic authority is given by a government to a group selected on the basis of a religious criterion.<sup>355</sup> Hence, Justice Souter's analysis suggested that if government action conferred civic authority based on the religion of the recipients of that authority, the fusion of civic and religious authority or functions would result and the fusion test would be violated. When the fusion test is violated, so too is the Establishment Clause.

The fusion test distinguishes between selection of a group to hold civic authority based on religious criteria and selection based on neutral factors despite the fact that the group is comprised of members of the same

352. *Id.* at 222. The Court went on to invalidate state laws which required the public school day to begin with readings from the Bible. *Id.* at 223. The Court found the requirement that students engage in a religious exercise to violate the Establishment Clause's command of government neutrality towards religion. *Id.*

353. *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 126-27 (1982) (quoting *Schempp*, 374 U.S. at 222). This statement stood as the beginning of the Court's summary of why the statute at issue violated the Establishment Clause. *Id.* at 126-27. The bulk of the Court's analysis, however, was framed in *Lemon* terms. *Id.* at 122-27. Additionally, in *Lee v. Weisman*, Justice Blackmun explained that "religious freedom cannot exist in the absence of a free democratic government, and that such a government cannot endure when there is fusion between religion and the political regime." 112 S. Ct. 2649, 2667 (1992) (Blackmun, J., concurring). Justice Souter, in *Grumet*, however, did not cite this fusion rhetoric. *Grumet*, 114 S. Ct. at 2488-90.

354. *Grumet*, 114 S. Ct. at 2488 (citing *Allegheny County v. ACLU*, 492 U.S. 573, 590-91 (1989); *Larkin*, 459 U.S. at 127; *Torcaso v. Watkins*, 367 U.S. 488, 493-94 (1961); *Everson v. Board of Educ.*, 330 U.S. 1, 15-16 (1947)).

355. *Id.* at 2489-90. "Where 'fusion' is an issue, the difference lies in the distinction between a government's purposeful delegation on the basis of religion and a delegation on principles neutral to religion, to individuals whose religious identities are incidental to their receipt of civic authority." *Id.* at 2489.

religion.<sup>356</sup> Thus, in *Grumet*, Justice Souter found the New York legislature's enactment of Chapter 748 "to be substantially equivalent to defining a political subdivision and hence the qualification for its franchise by a religious test, resulting in a purposeful and forbidden 'fusion of governmental and religious functions.'"<sup>357</sup> To determine whether Chapter 748 delegated civic authority based on religion or on neutral grounds, Justice Souter looked to the context of the statute's enactment.<sup>358</sup> Justice Souter's analysis suggested that an analysis of the circumstances motivating the government action would be used to determine, under the fusion test, when a policy was "substantially equivalent" to allocating civic power to a religious group, absent express language in the law referring to religion or religious groups as the basis for the conferral of power.<sup>359</sup>

Justice Souter's fusion test emerged from a handful of precedents which did not rely on fusion as a rule against which to measure the Establishment Clause issues.<sup>360</sup> Hence, the fusion test is significant because it placed these previously-conceived ideas regarding the fusion of governmental and religious authority at the forefront of Establishment Clause jurisprudence. In *Grumet*, the fusion test was the main support upon which the Court's decision rested and commanded the support of four Justices.<sup>361</sup> As no single test currently enjoys the consistent support of a majority of Justices,<sup>362</sup> the fusion test will likely only be used in cases factually similar to *Larkin* and *Grumet*. Therefore, the fusion test is not singularly definitive of the Court's current Establishment Clause approach. The fusion test does, however, now exist as a distinct approach the Court may continue to utilize when deciding Establishment Clause cases. In cases where government attempts to alleviate a burden

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356. *Id.* at 2488-89.

357. *Id.* at 2490 (quoting *Larkin*, 459 U.S. at 126).

358. *Id.* at 2489-90.

359. *Id.*; see *supra* note 216 and accompanying text.

360. See *supra* notes 351-54 and accompanying text.

361. *Grumet*, 114 S. Ct. at 2484. Justices Blackmun, Stevens and Ginsburg joined in Justice Souter's promulgation of the fusion test. *Id.* However, Justice Blackmun's retirement from the Court after the term in which *Grumet* was decided reduced the fusion test's support by one Justice. See Patricia A. Brennan & Daniel B. Kohrman, *The 1993-94 Term of the United States Supreme Court and its Impact on Public Schools*, 93 EDUC. L. REP. 1, 2 (West 1994) (noting Justice Blackmun's departure from the court).

362. For example, in *Grumet*, a majority of Justices could not agree on the approach to be applied in deciding the case, but six Justices did agree that Chapter 748 violated the Establishment Clause. 114 S. Ct. 2481. In *Lamb's Chapel v. Center Moriches Union Free School District*, decided in the term before the *Grumet* decision, the vote was unanimous, but three opinions with differing analysis were written. 113 S. Ct. 2141 (1993).

on a religious group by allowing it to more directly control its civic destiny, or where government blatantly places religious groups in positions of civic authority, Justice Souter's fusion test may guide the Court's decisions.

*c. The History Test*

In *Marsh v. Chambers*,<sup>363</sup> Chief Justice Burger applied what can be labeled the history test<sup>364</sup> to a challenge of the Nebraska legislature's practice of opening each legislative session with a prayer lead by a publicly-funded chaplain.<sup>365</sup> Chief Justice Burger's history test looked to the history of a particular practice to assess whether its religious components had traditionally been permitted, or even sanctioned, by law.<sup>366</sup> The test then used that history as a guide to assess whether the Framers intended to allow such practices.<sup>367</sup> Justice Burger explained that "[s]tanding alone, historical patterns cannot justify contemporary violations of constitutional guarantees, but there is far more here than simply historical patterns."<sup>368</sup> The "far more" was the Framers' intent as to the meaning and application of the Establishment Clause, which supported the practice at issue in *Marsh*.<sup>369</sup> Hence, because "the opening of sessions of legislative and other deliberative public bodies with prayer is deeply embedded in the history and tradition" of the United States, the Nebraska practice passed constitutional muster under the history test.<sup>370</sup>

In his dissenting opinion in *Wallace v. Jaffree*,<sup>371</sup> Justice Rehnquist gave a detailed account of the history of the birth of the Establishment

363. 463 U.S. 783 (1983).

364. This approach has been called many things, such as "fidelity to the longstanding traditions of our people," *Grumet*, 114 S. Ct. at 2515 (Scalia, J., dissenting), or an "original intent" approach, Russell M. Mortyn, Note, *The Rehnquist Court and the New Establishment Clause*, 19 HASTINGS CONST. L.Q. 567, 577 (1992). See Ivan E. Bodensteiner, *The "Lemon Test" Even With All Its Shortcomings, is Not the Real Problem in Establishment Clause Cases*, 24 VAL. U. L. REV. 409, 411-12 (1990) (analyzing *Marsh*).

365. *Marsh*, 463 U.S. at 784.

366. *Id.* at 786-95.

367. *Id.* at 786-91.

368. *Id.* at 790.

369. *Id.*

370. *Id.* at 786, 791. Justice Stevens is the only current member of the Court who dissented in *Marsh*. *Id.* at 822 (Stevens, J., dissenting). Chief Justice Rehnquist and Justice O'Connor were in the majority in *Marsh*. *Id.* at 784.

371. 472 U.S. 38 (1985).



Clause and its meaning in the Eighteenth and Nineteenth centuries.<sup>372</sup> This use of history to conclude that the "well-accepted meaning" of the Establishment Clause is that "it forbade establishment of a national religion, and forbade preference among religious sects or denominations," stands as a significant contribution to the history test.<sup>373</sup>

These and other opinions provided the foundation for the history test as it exists after *Grumet*.<sup>374</sup> Justice Scalia's formulation of the history test in *Grumet* analogously, yet simply, required "fidelity to the long-standing traditions of our people" to be applied as the "foremost principle" in deciding Establishment Clause cases.<sup>375</sup> In *Grumet*, Justice Scalia criticized the Court for having "abandoned text and history as guides" in making its decision.<sup>376</sup> Justice Scalia's dissent relied on the teachings of history and social tradition to draw its conclusions.<sup>377</sup> This suggests that

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372. *Id.* at 91-106 (Rehnquist, J., dissenting).

373. *Id.* (Rehnquist, J., dissenting). This decision, coupled with his pro-history decisions since *Wallace*, including *Grumet*, places Chief Justice Rehnquist among the supporters of the history test. See *Grumet*, 114 S. Ct. at 2505 (joining Scalia, J., dissenting); *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 29 (1989) (joining Scalia, J., dissenting); see also Timothy V. Franklin, *Squeezing the Juice Out of the Lemon Test*, 72 EDUC. L. REP. 1, 10-11 (West 1992) (analyzing Chief Justice Rehnquist's history-oriented Establishment Clause approach); Mortyn, *supra* note 364, 574-77 (explaining Chief Justice Rehnquist's use of original intent in his Establishment Clause decision making).

374. See *Texas Monthly*, 489 U.S. at 33 (Scalia, J., dissenting, joined by Rehnquist, C.J., and Kennedy, J.) (dissenting because there was "no basis in the text of the Constitution, the decisions of this Court, or the traditions of our people" for the Court's decision); *County of Allegheny v. ACLU*, 492 U.S. 573, 656 (1989) (Kennedy, J., concurring in part and dissenting in part, joined by White, J., and Scalia, J.) (using "proper sensitivity to our traditions and our case law" as a check on the *Lemon* test in order to make it an acceptable mode of analysis for Establishment Clause cases).

375. *Grumet*, 114 S. Ct. at 2515 (Scalia, J., dissenting); see Franklin, *supra* note 373, at 13 (explaining Justice Scalia's Establishment Clause positions and his emphasis on history and tradition as guidelines); Joseph R. McKinney, *Special Education and the Establishment Clause in the Wake of Zobrest: Back to the Future*, 85 EDUC. L. REP. 587, 595 (West 1993) (noting that "Justice Scalia is in Chief Justice Rehnquist's camp regarding the use of an original intent-historical approach").

376. *Grumet*, 114 S. Ct. at 2506 (Scalia, J., dissenting). Generally, in his decisions regarding constitutional issues, Justice Scalia "places heavy reliance on the intent of the framers and the legislative history behind the enactment of that part of the Constitution" and "believes that long-standing views in society should be given deference." Schlosser, *supra* note 111, at 387-88 (footnote omitted); see also *Allegheny*, 492 U.S. at 670 (Scalia, J., joining Kennedy, J., dissenting) (asserting that Establishment Clause cases must be assessed against "historical practices and understandings").

377. *Grumet*, 114 S. Ct. at 2505-16 (Scalia, J., dissenting). Chastising the Court's decision in *Grumet*, Justice Scalia warned that "[o]nce this Court has abandoned text and history as guides, nothing prevents it from calling religious toleration the establishment of religion." *Id.* at 2506 (Scalia, J., dissenting). Justice Scalia stated that to accept Justice Souter's characterization of Chapter 748 as "civil authority held by a

Justice Scalia's current formulation of the history test, which is supported by Chief Justice Rehnquist and Justice Thomas,<sup>378</sup> would take into account modern popular practice, in addition to the text and history of the Establishment Clause and religious practice in the United States, when analyzing cases.<sup>379</sup>

While *Marsh* is the only case in which the history test commanded the support of a majority of Justices,<sup>380</sup> in *Grumet*, the Chief Justice and two other Justices affirmed their adherence to the current version of the history test.<sup>381</sup> Despite the fact that a majority of Justices do not adhere to the test on all Establishment Clause occasions,<sup>382</sup> the *Marsh* case

church" and not "civil authority held by members of a church . . . one must believe that large portions of our history were unconstitutional, and that much more of it than merely the Kiryas Joel School District is unconstitutional today." *Id.* at 2507 (Scalia, J., dissenting). Furthermore, Justice Scalia asserted that "[w]hen a legislature acts to accommodate religion, particularly a minority sect, 'it follows the best of our traditions.'" *Id.* at 2511-12 (Scalia, J., dissenting) (quoting *Zorach v. Clauson*, 343 U.S. 306, 314 (1952)).

378. Chief Justice Rehnquist and Justice Thomas joined in Justice Scalia's *Grumet* dissent. *Id.* at 2500 (Scalia, J., dissenting). Justice Thomas agreed with Justice Scalia's historical approach in *Lamb's Chapel v. Center Moriches Union Free School District*, 113 S. Ct. 2141, 2149 (1993) (Scalia, J., concurring), and *Lee v. Weisman*, 112 S. Ct. 2649, 2678 (1992) (Scalia, J., dissenting).

379. See Schlosser, *supra* note 111, at 387-88. Justice Scalia relies on history to frame his analysis in other areas of constitutional adjudication as well. See, e.g., Gregory C. Cook, Note, *Footnote 6: Justice Scalia's Attempt to Impose a Rule of Law on Substantive Due Process*, 14 HARV. J.L. & PUB. POL'Y 853, 859 (1991) (analyzing Justice Scalia's "rule of law for determining which historical practices and beliefs the Court should consider in due process analysis," which consists of an examination of "the most specific level at which a relevant tradition can be identified protecting or denying protection to the asserted right").

380. "The Supreme Court has not applied the historical test in any Establishment Clause decision except *Marsh*." Allan Gordus, Note, *The Establishment Clause and Prayers in Public High School Graduations: Jones v. Clear Creek Independent School District*, 47 ARK. L. REV. 653, 657 (1994).

381. *Grumet*, 114 S. Ct. at 2505 (Scalia, J., dissenting).

382. For example, Justice O'Connor joined in the Court's *Marsh* opinion, 463 U.S. 783 (1983), yet she usually applies her endorsement test which is an offshoot of the *Lemon* test. See *supra* notes 316-29 and accompanying text.

Also, by way of example, Justice Kennedy applied his coercion test in *Lee v. Weisman*, 112 S. Ct. 2649, 2655-61 (1992). The coercion test prohibits government from coercing citizens to participate in formal religious exercises. See Gordus, *supra* note 380, at 681-83 (explaining the coercion test). Justice Kennedy's coercion test, after *Weisman*, generated speculation as to whether the coercion test would govern future Establishment Clause cases. See generally Caress, *supra* note 147; Cohen, *supra* note 147; Kahn, *supra* note 150; Smith, *supra* note 150. However, neither Justice

demonstrated that when a religious practice is clearly and deeply embedded in this nation's history, the Justices are likely to cast aside their usual analysis and sign on to the history test.<sup>383</sup> Thus, following *Grumet*, the history test remains a viable Establishment Clause framework for at least three Justices, and perhaps occasionally more.

#### d. *The Lemon Test*

The *Lemon* test is a sore subject in Establishment Clause jurisprudence if for no other reason than because of the repeated blows it suffers at the hands of the Court, and Court watchers, every time the Court grants certiorari to an Establishment Clause case.<sup>384</sup> The battle, however, may be over and *Lemon* will, most likely, abdicate its position at the center of the Court's Establishment Clause jurisprudence with a whimper rather than a bang. In recent cases, the Court has slowly divorced itself from *Lemon*,<sup>385</sup> returning only occasionally and for no apparent rea-

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Kennedy nor any other Justices applied, or even mentioned, coercion in *Grumet*. See *Grumet*, 114 S. Ct. 2481. The coercion test accompanies Justice Kennedy's opinions and votes which indicate his strong tendency towards using history as a guide in Establishment Clause cases. "Whatever test we choose to apply must permit not only legitimate practices two centuries old but also any other practices with no greater potential for an establishment of religion." *County of Allegheny v. ACLU*, 492 U.S. 573, 670 (1989) (Kennedy, J., concurring in part and dissenting in part). This statement, made just after Justice Kennedy commented that *Marsh*, 463 U.S. 783, should be broadly interpreted, indicated that Justice Kennedy agrees with the historical approach applied in *Marsh*. See Mykkeltvedt, *supra* note 31, at 895 (discussing the *Lemon* test as it was applied in *Marsh*); see also Franklin, *supra* note 373, at 14 (explaining Justice Kennedy's "acceptance of the *Marsh* historical analysis, and a philosophy which accommodates religion by permitting non-coercive establishments," and concluding that "Justice Kennedy can be expected to support an historical revision of *Lemon*"). In his dissent in *Weisman*, Justice Scalia sharply criticized Justice Kennedy's use of the coercion test and called him "a defector from [Justice Scalia's] own previously proclaimed views on establishment doctrine." Mykkeltvedt, *supra* note 31, at 903. Thus, his *Grumet* and *Weisman* opinions indicate that Justice Kennedy may be pulling away from his alliance with Justice Scalia and the history test.

383. See generally Bodensteiner, *supra* note 364, at 411-12 (noting that, regarding the *Marsh* decision, "[m]aybe the majority was 'result oriented' and the historical test allowed it to reach the 'right' result").

384. See, e.g., *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 113 S. Ct. 2141, 2149-50 (Scalia, J., concurring) (comparing *Lemon* to "some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried" and cataloguing Justices Kennedy, Thomas, O'Connor, and White's rejections of *Lemon*); Wirt P. Marks IV, Note, *The Lemon Test Rears its Ugly Head Again: Lamb's Chapel v. Center Moriches Union Free School District*, 27 U. RICH. L. REV. 1153 (1993); Jill M. Misage, Note, *Refusing to Abandon a Real Lemon of a Test: North Carolina Civil Liberties Union v. Constangy*, 28 WAKE FOREST L. REV. 775 (1993). See generally Shimonek, *supra* note 31.

385. See, e.g., *Wallace v. Jaffree*, 472 U.S. 38 (1985) (modifying *Lemon* to include

son.<sup>386</sup> A test so frequently abused by a growing number of Justices does not possess the strength to remain at the center of the whirlwind that is Establishment Clause jurisprudence.<sup>387</sup>

The Court may have snubbed *Lemon* in *Grumet* because *Lemon* has occasionally been deemed a test only for use in aid to private religious schools cases,<sup>388</sup> and, arguably, *Grumet* did not deal with aid to religious schools but instead with a state's delegation of power based on religious criteria. However, the Court's failure to make such an acknowledgment suggests that, rather than being avoided for that reason, *Lemon* was placed out of *Grumet*'s reach simply because the Justices do not know what, if anything, they want to do with the *Lemon* test. Justices Souter, Ginsburg, and Stevens avoided *Lemon* altogether.<sup>389</sup> Justice O'Connor admitted that the Court did not apply *Lemon* and, without saying whether or where *Lemon* would fit into her new scheme, which would allegedly rid the Establishment Clause of the problems brought upon by the Court's not-so-persistent adherence to the *Lemon* test, argued for the reconsideration of a case decided under *Lemon*.<sup>390</sup> Justice Kennedy did not use *Lemon* in his analysis and called for the reconsideration of two cases decided under *Lemon*.<sup>391</sup> Additionally, the *Grumet*

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endorsement analysis); *Marsh*, 463 U.S. 783 (applying the history test rather than *Lemon*); *Larson v. Valente*, 456 U.S. 228, 252 (1982) (limiting *Lemon*'s application).

386. For example, in 1993, the Court used the *Lemon* test to quickly dismiss the Establishment Clause issue involved in *Lamb's Chapel*, 113 S. Ct. at 2148, but did not apply it to assess the Establishment Clause issues raised in *Zobrest v. Catalina Foot-hills School District*, 113 S. Ct. 2462 (1993).

387. For example, in *Grumet*, Justice O'Connor admitted that the *Lemon* test has outlived its usefulness, and Chief Justice Rehnquist and Justices Scalia and Thomas called for its expulsion from the Court's Establishment Clause jurisprudence. 114 S. Ct. at 2500 (O'Connor, J., concurring), 2515 (Scalia, J., dissenting). Indeed, Chief Justice Rehnquist and Justices O'Connor, Scalia, Kennedy, and Thomas "have written or joined opinions criticizing the test and arguing for a different analysis." Baker, *supra* note 1, at 250.

388. See *School Dist. of Grand Rapids v. Ball*, 473 U.S. 373, 383 (1985) (noting that the Court has "particularly relied on *Lemon* in every case involving the sensitive relationship between government and religion in the education of our children"); see also Underwood, *supra* note 25, at 56 (noting that the Court "has not strictly adhered to the *Lemon* analysis outside the context of education" and that the Court most visibly departs from *Lemon* in noneducation cases).

389. See *supra* note 208, 235-39 and accompanying text.

390. *Grumet*, 114 S. Ct. at 2498-2500 (O'Connor, J., concurring) (suggesting reconsideration of *Aguilar v. Felton*, 473 U.S. 402 (1985)); see *supra* note 256 and accompanying text.

391. *Grumet*, 114 S. Ct. at 2500-05 (Kennedy, J., concurring). Justice Kennedy noted

dissenters, Chief Justice Rehnquist and Justices Scalia and Thomas, reiterated their dissatisfaction with the test and cases decided pursuant to it and stated that they would replace it as soon as possible with the history test.<sup>392</sup> Thus, three Justices have all but forgotten *Lemon*, at least with regard to the issues raised in *Grumet*, and five Justices reject *Lemon* outright. As a final blow to the embattled test, Justice Blackmun, the lone voice in support of *Lemon*, retired from the Court after the term in which *Grumet* was decided.<sup>393</sup>

The Court will likely never again look to *Lemon* as the Establishment Clause test. If there is any usefulness left in this sour fruit, it will be that given to it when Justice O'Connor's multiple-test Establishment Clause recipe calls for just a small dose of *Lemon*—à la endorsement test of course—in cases dealing with public funding of private religious schools<sup>394</sup> or when Justice Souter's fusion test uses entanglement as a justification for prohibiting the fusion of governmental and religious authority.<sup>395</sup>

In summary, after *Grumet*, the Justices' Establishment Clause approaches to cases involving government conferral of power on religious groups appear to be as follows: Justices Souter, Stevens, and Ginsburg<sup>396</sup> will invalidate any fusion of civic and religious authority; Justice O'Connor will search for narrow tests, one for each distinct kind of Establishment Clause issue, and invalidate laws which confer civic authority based on religion;<sup>397</sup> Justice Kennedy will invalidate religious gerrymandering,<sup>398</sup> and Chief Justice Rehnquist and Justices Scalia and Thomas will continue to faithfully adhere to the history test.<sup>399</sup>

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*Lemon's* flaws and advocated an alternative approach. *Id.*; see *supra* notes 265-77 and accompanying text.

392. *Grumet*, 114 S. Ct. at 2515 (Scalia, J., dissenting); see also *supra* notes 308-11 and accompanying text.

393. See Brennan & Kohrman, *supra* note 361, at 1 (noting Justice Blackmun's retirement). Justice Stephen Breyer has replaced Justice Blackmun. *Id.*; see also Joan Biskupic, *Breyer Belatedly Gets His White House Ceremony*, WASH. POST, Aug. 13, 1994, at A9.

394. *Lemon* has yet to be completely forgotten in cases involving public funding of private education. See Underwood, *supra* note 25, at 95.

395. See *Grumet*, 114 S. Ct. at 2488.

396. "At her confirmation hearing [Justice Ginsburg] tentatively endorsed the *Lemon* test, at least in the abstract, because she said she was not aware of any better alternative." Baker, *supra* note 1, at 250.

397. See *supra* notes 240-64 and accompanying text.

398. See *supra* notes 265-77 and accompanying text.

399. See *supra* notes 374-81 and accompanying text.

e. *How Will Courts Approach Future Establishment Clause Cases?*

*Grumet's* six to three vote and six separate opinions represent "a confusing cacophony of judicial interpretation concerning the Establishment Clause."<sup>400</sup> After *Grumet*, endorsement, fusion, coercion,<sup>401</sup> history, *Lemon*, and Justice O'Connor's multi-test approach all exist as alternative modes of Establishment Clause analysis. This leaves the lower courts with an almost endless array of tests and principles to apply to Establishment Clause cases; the correct approach or approaches will undoubtedly remain elusive until the Court provides further guidance.<sup>402</sup>

The rationale used by the Court to find Chapter 748 unconstitutional contradicted the legal community's predictions regarding what and how the Court would decide in *Grumet*. Most significantly, as explained above in the Factual Background section, all of the lower courts relied exclusively on the *Lemon* test to reach their decisions.<sup>403</sup> Justice Scalia, in *Grumet*, pointed out that the Court's failure to rely on *Lemon* effectively disregarded over eighty pages of the parties' briefs which focused on the *Lemon* test.<sup>404</sup> The amicus briefs filed on behalf of both sides in *Grumet* dealt with *Lemon* at length, either describing how it validated or invalidated Chapter 748 or why it should be kept or abandoned as the dominant Establishment Clause test.<sup>405</sup> Commentators also noted that

400. David Schimmel, Kiryas Joel Village School District v. Grumet: *The Establishment Clause Controversy Continues*, 94 EDUC. L. REP. 685, 687 (West 1994).

401. A full evaluation of the coercion test is beyond the scope of this Note. However, for an introduction to the test and when the Court used it, see *supra* note 382. For an argument that the coercion test has replaced the *Lemon* test as the new Establishment Clause test, see Paulsen, *supra* note 31, at 819-43.

402. See Schimmel, *supra* note 400, at 688.

403. See *supra* notes 184-201 and accompanying text.

404. *Grumet*, 114 S. Ct. at 2515 (Scalia, J., dissenting).

405. For amicus brief urging affirmance, see Brief for the American Jewish Congress, National Jewish Community Relations Advisory Council, People for the American Way, General Conference of Seventh-Day Adventists, & the Union of American Hebrew Congregations (urging the Court to apply *Larkin v. Grendel's Den* as the instructive precedent and urging that *Lemon* be applied and found to be violated by Chapter 748); Brief for Americans United for Separation of Church and State, American Jewish Committee, Anti-Defamation League, American Civil Liberties Union, National Council of Jewish Women, & The Unitarian Universalist Association (arguing that Chapter 748 constituted an unconstitutional delegation of government power to a religious group); Brief for the Committee for the Well-Being of Kiryas Joel (arguing that Chapter 748 fails the *Lemon* test); Brief for the Council on Religious Freedom (arguing that Chapter 748 fails the *Lemon* test, which should be retained by the Court, and constituted religious gerrymandering and should be invalidated under strict

*Grumet* represented another opportunity for the Court to explicitly reject *Lemon* and, or in the alternative, clarify its Establishment Clause jurisprudence; however, others insisted that the Court would continue along its current, undefined path.<sup>406</sup> These factors suggest that the Court's Es-

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scrutiny); Brief of the General Council on Finance and Administration of the United Methodist Church (arguing that Chapter 748 fails the *Lemon* test, which should be retained by the Court); Brief for the National Coalition for Public Education and Religious Liberty & the National Education Association (arguing that Chapter 748 delegated governmental power to a religious group in contravention of the Establishment Clause based on *Larkin*); Brief for the National Council of Churches of Christ in the U.S.A. & James E. Andrews as Stated Clerk of the General Assembly of the Presbyterian Church (U.S.A.) (urging the Court to clarify the second prong of *Lemon* and the endorsement test); Brief for the National School Boards Association (arguing that Chapter 748 violates *Lemon* and the Court's other Establishment Clause tests); Brief for the New York Committee for Public Education and Religious Liberty (arguing that the Court should apply *Lemon* to find Chapter 748 unconstitutional); Brief for the New York State United Teachers, AFT, AFL-CIO & the American Federation of Teachers, AFL-CIO (arguing that Chapter 748 violates the *Lemon* test and should be subject to strict scrutiny under *Larson v. Valente*).

For amicus briefs urging reversal see Brief for the Agudath Israel of America (urging reconciliation of the two religion clauses that gives wide latitude to religious groups' free exercise interests and urging the reconsideration of *Aguilar* and *Grand Rapids*); Brief for the Institute for Religion and Polity (arguing that the Court's analysis based on neutrality, embodied in *Lemon*, is flawed and suggesting that the coercion test is a better approach); Brief for The National Jewish Commission on Law and Public Affairs (urging that *Lemon* be overruled to allow for the accommodation of the secular needs of religious communities, and arguing that Chapter 748 survives scrutiny under *Lemon*); Brief for The Rutherford Institute (urging the Court not to use the *Lemon* test, but rather to apply neutrality and equal protection principles); Brief for the Southern Baptist Convention Christian Life Convention (arguing that accommodation of and benevolent neutrality towards religion is the best way to protect the liberties provided by the Free Exercise and Establishment Clauses); Brief for the United States Catholic Conference (recognizing the Court's preference for legislative solutions to social problems and the difficulties inherent in applying the *Lemon* test, and arguing that *Aguilar* and *Grand Rapids* should be overruled to avoid similar problems in the future and that Chapter 748 should be upheld).

406. See, e.g., Joan Biskupic, *School District Raises Church-State Question: Court to Review Hasidic Village Arrangement*, WASH. POST, November 30, 1994, at A16 (noting that, in voting to grant certiorari to *Grumet*, "the court voted to reconsider" *Lemon*); Victoria J. Dodd, *Education and Law Symposium: Introduction*, 39 S.D. L. REV. 233, 236 (1994) ("The final burial of *Lemon* . . . may come in [*Grumet*.]"); Olivo, *supra* note 11, at 777 (noting that *Grumet*, if it reached the Supreme Court, would "prove to be both an exceptional challenge and opportunity for clarification"); Ann M. Massie, *The Religion Clauses & Parental Health Care Decision-Making for Children: Suggestions for a New Approach*, 21 HASTINGS CONST. L.Q. 725, 749 n.117 (1994) (noting that *Grumet* "specifically raises the question of whether the *Lemon* test should be overruled"); Marc A. Stadtmauer, *Remember the Sabbath? The New York Blue Laws and the Future of the Establishment Clause*, 12 CARDOZO ARTS & ENT. L. J. 213, 220 n.118 (1994) (noting that "[t]he granting of certiorari in [*Grumet*] has been taken to be a signal from the court that they are planning to once again review the *Lemon*

tablishment Clause jurisprudence is not at all clear to the lower courts or the litigants before them.<sup>407</sup>

Given the dichotomy between how the lower courts and the legal community analyzed *Grumet* and how the Supreme Court analyzed *Grumet*, the legal community is left wondering how long the Court's "doctrinal gridlock" will last and what will eventually become of the Court's Establishment Clause jurisprudence.<sup>408</sup> While commentators have the luxury of waiting out this storm, lower courts must decipher Establishment Clause precedent and decide what rules apply in the meantime.

Until the Court offers further clarification, lower courts are probably best-advised to analogize the controversy before them to the most factually similar precedent and decide accordingly—regardless of the rationale on which they base their decision.<sup>409</sup>

For further guidance, courts should assess where the controversy before them fits into the various lines of Establishment Clause precedent discussed in the Historical Background section and then reconcile their case with the principles involved in the line of cases the controversy before them most clearly resembles. While the Court cannot seem to agree on a rationale or test for Establishment Clause cases, these lines of cases still produce consistent results after *Grumet*<sup>410</sup>—those results will

standard"). But see Huefner, *supra* note 101 (observing that when the Court decides *Grumet*, it "could reinvigorate the *Lemon* test . . . or introduce yet another analysis of its own"); Lupu, *supra* note 25, at 269 ("[T]he Court will once again neither adhere to *Lemon* nor overrule it . . . because Establishment Clause precedent of the last ten years offers many ways to steer around *Lemon* and still come out either way"); Thiemann, *supra* note 10, at 48 (1994) ("The Court's record in adjudicating cases involving the religion clauses gives us little reason to believe that its judgment in [*Grumet*] will be particularly enlightening.").

407. "*Grumet* throws establishment clause doctrine further into disarray . . . . [T]he establishment clause console is now so cluttered with options that the court must confront the real possibility that it has relinquished its institutional responsibility to provide a clear user's manual." Bernard James, *High Court Takes Confusing Path*, NAT'L L. J., August 15, 1994, at C4, C5.

408. *Id.* at C5.

409. See Adams, *supra* note 101, at 1039 (suggesting that, with *Zobrest*, the Court began using "a new method of Establishment Clause interpretation in which the Court bases its holdings solely on factual similarities of previous cases instead of invoking the *Lemon* test").

410. The trick, however, is how to classify any given Establishment Clause controversy. For example, in *Grumet*, Justice Souter characterized Chapter 748 as a delegation of civic authority to a religious group, 114 S. Ct. at 2487, while Justice Scalia characterized the statute as simply creating a public school district, the inhabitants of which happen to "share the same religion," *id.* at 2506 (Scalia, J., dissenting).



be discussed in the next section.<sup>411</sup> While lower courts may not be correct as to the specific test that is appropriate for each case, a result in accord with precedent and general Establishment Clause principles is likely to be correct despite the use of the wrong test to reach that result. For instance, *Lemon*, fusion, and conferral of authority based on religion were all used by the Justices in *Grumet* to invalidate what the Court perceived as a conferral of governmental power on a religious group<sup>412</sup>—this result was consistent with government conferral of power on religious groups precedent generally.<sup>413</sup> The lower court decisions, despite being based almost completely on the *Lemon* test,<sup>414</sup> were affirmed by the Supreme Court.<sup>415</sup> Hence, the lower courts reached the right conclusion, even if they applied the “wrong” test.

## 2. Impact on Establishment Clause Caselaw

The arena of Establishment Clause caselaw is filled with numerous types of cases and no single case has been able to set *the* standard for deciding the diversity of issues raised by the first phrase of the First Amendment. *Grumet* must be kept in perspective and its lessons must not be extended too far lest the illusion of a “Grand Unified Theory” set in and distract the Court and court watchers for another two decades.<sup>416</sup> *Grumet*’s impact on the Court’s Establishment Clause jurisprudence, beyond its previously-explained effect on the tests proffered by the Justices,<sup>417</sup> must therefore be kept in perspective. That is, the different lines of Establishment Clause caselaw explored in the Historical Background section<sup>418</sup> will all be affected by *Grumet*, but *Grumet* does not represent a framework against which all future Establishment Clause cases could, or should, be judged. *Grumet*’s impact stems from its localized effects on the different kinds of cases explored in the Historical Background section and serves to both clarify and confuse how these lines of cases will evolve in the future. This section examines those impacts and predicts the evolution of those lines of cases.

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411. See *infra* notes 416-46 and accompanying text.

412. See *supra* notes 203-311 and accompanying text.

413. See *infra* notes 439-45 and accompanying text.

414. See *supra* notes 184-201 and accompanying text.

415. Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet, 114 S. Ct. 2481, 2484 (1994).

416. *Id.* at 2498-99 (O’Connor, J., concurring). Justice O’Connor explained that the *Lemon* test caused a similar distraction. *Id.* at 2498-500 (O’Connor, J., concurring).

417. See *supra* notes 315-99 and accompanying text.

418. See *supra* notes 24-151 and accompanying text.

a. *Impact on government aid to religion cases*

Government aid to religion cases can be placed into three subgroups: direct state funding of nonpublic institutions; neutral aid schemes, the benefit of which accrues to citizens regardless of religious affiliation or nonaffiliation; and removal of obstacles to free exercise.<sup>419</sup>

*Grumet* is not a direct state funding of nonpublic institutions case because, as pointed out by Justice Scalia, "no public funding, however slight or indirect" accrued to the private sectarian Village schools.<sup>420</sup> The Kiryas Joel District operated a public school and there was no evidence that such school operated explicitly to serve the religious mission of the Satmars, as did the Village's private schools.<sup>421</sup> Thus, *Grumet* will likely have little direct effect on that line of cases.

Future neutral aid scheme cases may feel *Grumet's* impact because five Justices stated their willingness to reconsider *Aguilar v. Felton*<sup>422</sup> and four stated their willingness to reconsider *School District of the City of Grand Rapids v. Ball*<sup>423</sup>—two direct state funding of religious institutions cases. In light of how the Village dealt with its disabled children's inability to receive state and federal aid to which they were entitled, those five Justices seem to have acknowledged, in *Grumet*, that sending

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419. See *supra* notes 30-67 and accompanying text (discussing direct state funding of nonpublic institutions cases); *supra* notes 68-108 and accompanying text (discussing neutral aid scheme cases); *supra* notes 109-21 and accompanying text (discussing removal of obstacles to free exercises cases).

420. *Grumet*, 114 S. Ct. at 2506 (Scalia, J., dissenting).

421. See *id.*; Petitioner Attorney General of the State of New York's Brief at 5, *Grumet* (Nos. 93-517, 93-527 & 93-539); Petitioner Board of Education of the Monroe-Woodbury Central School District's Brief at 6-7, *Grumet* (Nos. 93-517, 93-527 & 93-539).

422. *Grumet*, 114 S. Ct. 2498 (O'Connor, J., concurring), 2505 (Kennedy, J., concurring), 2515 (Scalia, J., dissenting).

423. *Id.* at 2505 (Kennedy, J., concurring), 2514-15 (Scalia, J., dissenting). Before the Court handed down its decision in *Grumet*, this commentary was offered to explain what would happen to Establishment Clause jurisprudence if *Aguilar v. Felton*, 473 U.S. 402 (1985), was invalidated:

New York could return to its original strategy of providing remedial services to disabled Satmarer children on the premises of the religious academies in the village. Of course, if *Aguilar* were to disappear, New York could act similarly with respect to all private schools, religious or otherwise, and thereby curb the constitutional defect as it presently stands. Such a practice would be perfectly consistent with formal religious neutrality, though not with separationism.

Lupu, *supra* note 25, at 272.

public employees to nonpublic schools to provide those services would be preferable to the solution offered by Chapter 748.<sup>424</sup> Recognizing that *Aguilar* and *Grand Rapids* prevented such a solution, the Justices expressed their sentiment that under a neutral, generally applicable law, like the IDEA, programs like those struck down in *Aguilar* and *Grand Rapids* would, in the future, represent permissible neutral aid schemes rather than impermissible direct state funding of religious groups.<sup>425</sup> Furthermore, all of the Justices in *Grumet* reaffirmed their support for neutral governmental aid schemes which incidentally benefit religion by including religious institutions within their reach.<sup>426</sup> Accordingly, *Grumet* will likely make some programs permissible as neutral aid scheme cases where formerly they would have been regarded as impermissible direct state aid to nonpublic institutions. The impact of this shift on governments' ability to provide special education services to private religious school students will be explored in the Governmental Impact section.<sup>427</sup>

At first glance, *Grumet* confuses removal of government obstacles to citizens' free exercise of religion cases.<sup>428</sup> *Grumet* is factually similar to *Wisconsin v. Yoder*,<sup>429</sup> a crucial removal of obstacles to free exercise case: both communities attempted to isolate themselves from modern American culture; both communities had their own cultural heritage very different from that of the rest of the nation, including modes of worship, dress, and social interaction; and both communities disagreed with their state governments' ideas as to how children should be educated.<sup>430</sup> In *Yoder*, the Court exempted Amish children from Wisconsin's compulsory education requirements because the children's free exercise interests would, in the Court's view, have been significantly compromised by requiring them to attend school beyond the eighth grade.<sup>431</sup> In *Grumet*, the Court denied the Satmar children a school district designed to alleviate the "panic, fear and trauma" they endured while attending public schools outside the Village because the New York legislature acted to

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424. See *supra* notes 254-58 and accompanying text; *supra* notes 273-76 and accompanying text; *supra* notes 306-07 and accompanying text.

425. See *supra* notes 254-58 and accompanying text; *supra* notes 273-76 and accompanying text. Justice Scalia also noted that *Aguilar* and *Board of Education of the City of Grands Rapids v. Ball*, 473 U.S. 373 (1985), are "so hostile to our national tradition of accommodation" that they "should be overruled at the earliest opportunity." *Grumet*, 114 S. Ct. at 2515 (Scalia, J., dissenting).

426. See *Grumet*, 114 S. Ct. at 2492-93 (plurality opinion), 2495 (Stevens, J., concurring), 2501 (Kennedy, J., concurring), 2506 (Scalia, J., dissenting).

427. See *infra* notes 447-85 and accompanying text.

428. See *supra* notes 109-121.

429. 406 U.S. 205 (1972).

430. *Grumet*, 114 S. Ct. at 2485-86; *Yoder*, 406 U.S. at 209-17.

431. 406 U.S. at 215-19, 36.

remedy the Satmars' unique plight when it enacted Chapter 748.<sup>432</sup> In both cases, therefore, the government (either the Court or state legislature) sought to exempt a religious group from compromising the integrity of its religious customs in order to either comply with the law or receive benefits provided by law. Neither exemption guaranteed that similar exemptions would be granted to all similarly situated groups.<sup>433</sup> The Court, however, did not decide the same way in both cases—it held for the Amish<sup>434</sup> but not the Satmars,<sup>435</sup> perhaps for three reasons.

First, *Yoder* involved a judge-made exemption of a religious group from criminal prosecution by a state enforcing its general, neutrally applicable education law. *Grumet*, on the other hand, involved a legislatively-enacted law that responded to a religious group's dissatisfaction with its school district's provision of social welfare services and conferred civic authority upon a village defined by its religious affiliation. Thus, the first difference between *Yoder* and *Grumet* is a distinction between a judge-made exception and legislatively-created civic authority. Second, the Amish were criminally prosecuted for exercising their religious beliefs while the Satmar were simply unable to take advantage of state and federal social welfare provisions in a manner most agreeable to them. The second difference, then, is a distinction between being subject to state persecution for adherence to particular beliefs and experiencing difficulty in attaining government services as a result of adherence to particular beliefs. Finally, in *Yoder*, the Court framed its analysis under the Free Exercise Clause and spent little time discussing Establishment Clause concerns.<sup>436</sup> *Grumet*, however, focused on the Establishment Clause and only briefly acknowledged Free Exercise concerns.<sup>437</sup> Therefore, the final difference in the Court's focus was on Free Exercise Clause principles in one case and Establishment Clause principles in another, despite the significant factual similarities.

In the future, these differences will aid the court in determining whether to apply the *Grumet* or *Yoder* standard in judging governmental accommodations of religious free exercise that invoke Establishment Clause concerns. Apparently, where a religious group seeks exemption from a criminal law because of religion, the Court will apply *Yoder* and

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432. 114 S. Ct. at 2485-87.

433. *Id.* at 2488; *Yoder*, 406 U.S. at 234-35.

434. *Yoder*, 406 U.S. at 234.

435. *Grumet*, 114 S. Ct. at 2494.

436. *Yoder*, 406 U.S. at 214, 235 n.22.

437. *Grumet*, 114 S. Ct. at 2487.

Free Exercise principles. On the other hand, where a religious group complains that it is denied social welfare benefits because of religion and the government responds with special treatment, the Court will probably apply *Grumet* and Establishment Clause principles. Thus, *Grumet's* impact in the area where Free Exercise and Establishment Clause concerns meet is in defining which religion clause courts should use in evaluating future cases with fact patterns analogous to *Yoder* and *Grumet*.<sup>438</sup>

*b. Impact on allocation of state power based on religion or in support of religion cases*

Future cases involving the allocation of state power in support of religion will be most directly impacted by *Grumet*.<sup>439</sup> These are likely to be significantly influenced by the *Grumet* result and, more specifically Justice Souter's new fusion test, when they present fact patterns similar to *Larkin v. Grendel's Den, Inc.*,<sup>440</sup> *Edwards v. Aguillard*,<sup>441</sup> and *Grumet* itself—where civic powers are placed in the hands of religious groups. Currently, five Justices support the *Grumet* result,<sup>442</sup> making the case an important solidification of the Court's disapproval of the purposeful delegation of political power to religious groups. Although only three Justices who supported the fusion test remain on the Court,<sup>443</sup> that is two more than supported the position of Justice O'Connor or Justice Kennedy in *Grumet*.<sup>444</sup> Although in *Larkin* and *Edwards*, the Court relied on the *Lemon* test,<sup>445</sup> after *Grumet*, it is clear that such a test is no longer satisfactory. Hence, the fusion test presents a new analytical framework under which future cases of this type can be evaluated. Therefore, *Grumet* solidified the principle that states may not place gov-

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438. While fact patterns analogous to *Grumet* and *Yoder* may seem rare, Chapter 748 sparked concern that if the statute survived constitutional attack "other religion-based school districts soon will follow: inner-city Muslims, Southern evangelicals, Catholics in South Boston." Mauro, *supra* note 182, at A2.

439. See *supra* notes 122-51 and accompanying text.

440. 459 U.S. 116 (1982).

441. 482 U.S. 578 (1987).

442. Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet, 114 S. Ct. 2481, 2484 (1994). Justice Blackmun, who sided with the majority in *Grumet*, retired from the Court after the 1993-94 term. See Herman Schwartz, *Justice Blackmun*, 43 AM. U. L. REV. 737 (1994).

443. Justices Stevens and Ginsburg supported Justice Souter's fusion test, along with Justice Blackmun who retired from the Court after the 1993-94 term. See Schwartz, *supra* note 442, at 738.

444. No other Justices joined in the concurrences of Justices O'Connor and Kennedy. *Grumet*, 114 S. Ct. at 2495 (O'Connor, J., concurring), 2500 (Kennedy, J., concurring).

445. *Edwards v. Aguillard*, 482 U.S. 578, 582-83 (1987); *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 123 (1982).

ernmental functions in the hands of religious groups and introduced a new test for judging such cases that commands the support of three Justices. As a result, future allocations of state power on religious grounds will clearly continue to result in Establishment Clause violations.

Thus, *Grumet* left substantively in tact, although rhetorically adjusted, the four Establishment Clause principles distilled earlier in the Historical Background section:<sup>446</sup> the government may not directly aid religion; the government may promulgate neutral aid schemes from which religion may incidentally benefit; the government may not delegate its power to religious groups; and the government may not endorse a particular religion.

### B. Governmental Impact

*Grumet* is the Court's second decision in as many terms which addresses the provision of special education services to disabled children attending private religious schools.<sup>447</sup> Thus, *Grumet* suggests that the Court is increasingly willing to allow the provision of state and federal aid to disabled students attending private religious schools, as long as the aid is provided under plans which are generally applicable to both private and public school students.<sup>448</sup> Beyond whether the Establishment Clause permitted the conduct at issue in *Grumet* and *Zobrest v. Catalina Foothills School District*<sup>449</sup> remained the issue of how the United States would balance its commitment to providing aid to disabled students with its duty to adhere to the Establishment Clause.<sup>450</sup> On one

446. See *supra* notes 24-151 and accompanying text.

447. In the 1992-1993 term the Court decided *Zobrest v. Catalina Foothill School District*, 113 S. Ct. 2462 (1993). See *supra* notes 97-98, 101-04 and accompanying text.

448. See Schimmel, *supra* note 400, at 696 (suggesting that *Grumet's* significance lies in the Justices' call to reconsider *Aguilar v. Felton*).

449. 113 S. Ct. 2462 (1993).

450. See generally Allan G. Osborne, *Special Education and Related Services for Parochial School Students*, 81 EDUC. L. REP. 1 (West 1993) (evaluating the effect of the Court's Establishment Clause jurisprudence on the provision of special education services to religious school students). Osborne points out that, while the Court has approved the provision of special education services at neutral sites adjacent to private schools, this is not a viable alternative for private school students with serious disabilities. *Id.* at 1. Also, religious beliefs, such as those of the Satmar Hasidim, may prevent children from leaving their private schools and receiving services at public schools. *Id.* As a result, "a child with disabilities does not have the same freedom of choice that a nondisabled child has" and parents may be "forced to choose between adhering to their religious beliefs or exercising their right to obtain an appropriate

hand, it is inequitable for a government, whether state or federal, to provide special education services to disabled students attending public schools and not to those attending private, sometimes religious, schools.<sup>451</sup> Such a distinction is explicitly rejected by the IDEA.<sup>452</sup> Nevertheless, providing government-funded services to students in private religious schools triggers significant Establishment Clause concerns.<sup>453</sup> This section briefly examines the nature of the government aid involved in this area, reviews the Court's relevant pre-*Grumet* case law and evaluates how *Grumet* impacts the solution of future conflicts between government aid programs benefitting disabled private religious school students and the Establishment Clause.

At the federal level, the IDEA<sup>454</sup> authorizes the provision of certain special education services to eligible disabled students.<sup>455</sup> The IDEA "distributes benefits neutrally to any child qualifying as disabled" under the act "without regard to the sectarian-nonsectarian nature of the educational institution."<sup>456</sup> Qualifying students are entitled "access to programs and services appropriate to meet their special education needs."<sup>457</sup> More specifically:

[S]chool districts must provide children with disabilities with a "free appropriate public education" which requires that "special education" and "related services" be provided at public expense, in conformity with an "individualized education

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education for their children." *Id.*

451. *Id.* "People may not be denied rights and privileges available to nonbelievers just because they are religious." Sturtz, *supra* note 101, at 308.

452. 20 U.S.C.A. § 1413(a)(4)(A) (West 1990 & Supp. 1994); see Petitioner Board of Education of the Monroe-Woodbury Central School District's Brief at 28.

453. See *supra* notes 30-31, 77-90 and accompanying text.

454. 20 U.S.C.A. § 1400 et seq. (West 1990 & Supp. 1994). The IDEA was first known as the Education for the Handicapped Act, Part B, which passed in 1975. See Michaelle G. Cacchillo, Note, *Zobrest v. Catalina Foothills School District: A Victory for Disabled Children, A Snub for the Lemon Test*, 25 LOY. U. CHI. L.J. 445, 445 (1994); Perry A. Zirkel, *Over-Due Process Revisions for the Individuals with Disabilities Education Act*, 55 MONT. L. REV. 403 (1994).

455. 20 U.S.C. 1400-1485 (1988). For a summary of the IDEA and private education, see Cacchillo, *supra* note 454, 447-50.

456. Petitioner Board of Education of the Monroe-Woodbury Central School District's Brief at 8 (citing *Zobrest v. Catalina Foothills Sch. Dist.*, 113 S. Ct. 2462 (1993); *Witters v. Washington Dep't. of Servs. for the Blind*, 474 U.S. 481 (1986)). Furthermore, the IDEA "specifically mandates inclusion of private (including parochial) school students within the programs and services required by the Act." *Id.* at 28; see *Zobrest*, 113 S. Ct. at 2467. The Court has also held that parents must be reimbursed for expenses incurred in sending their child to a private school if the parents do so in response to the public school's inadequate accommodation of the child's disability under the IDEA and the private school offers better services under the IDEA. *Florence County Sch. Dist. Four v. Carter*, 114 S. Ct. 361, 362 (1993).

457. Petitioner Board of Education of the Monroe-Woodbury Central School District's Brief at 28.

program" . . . tailored to meet the unique needs of the individual student with disabilities. All students with disabilities are entitled to receive these services in the district where they reside.<sup>458</sup>

Supplementing this nationwide command, states have implemented similar programs which set standards for the education of and provision of services for disabled students.<sup>459</sup> When a student entitled to receive services under the IDEA (or its state counterpart) attends a private religious school, Establishment Clause concerns arise.<sup>460</sup>

As discussed in the Historical Background section, the Court consistently invalidates those programs it characterizes as direct money grants to private religious schools, regardless of the purpose of the grants.<sup>461</sup> In *Aguilar v. Felton*,<sup>462</sup> and *School District of the City of Grand Rapids v. Ball*,<sup>463</sup> the Court also invalidated state statutes which sent public employees into private religious schools to provide various health and welfare services.<sup>464</sup> However, the provision of certain services to private religious school students, like diagnostic health services, has met Court approval where the services are part of generally applicable aid schemes from which both public and nonpublic students benefit and which do not directly further the religious missions of private religious schools.<sup>465</sup> Specifically, in *Witters v. Washington Department of Services for the Blind*<sup>466</sup> and *Zobrest*,<sup>467</sup> the Court approved the provision of state special education services to disabled students under neutral, generally applicable government aid programs.<sup>468</sup> Further, in *Zobrest*, the Court addressed the issue of whether, under the IDEA, a state employee could accompany a deaf student to his private religious school as his deaf-language interpreter.<sup>469</sup> The Court stated:

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458. Respondents' Brief at 14.

459. See, e.g., ARIZ. REV. STAT. ANN. § 15-761 et seq. (1991 & Supp. 1994); N.Y. EDUC. LAW ART. 89 (McKinney 1994); VA. CODE ANN. §§ 22.1-213, -221 (Michie 1950).

460. See, e.g., *Grumet*, 114 S. Ct. at 2484-85; *Zobrest*, 113 S. Ct. at 2462; *Witters*, 474 U.S. at 481.

461. See *supra* notes 32-62 and accompanying text.

462. 473 U.S. 402 (1985).

463. 473 U.S. 373 (1985).

464. See *supra* notes 51-62 and accompanying text.

465. See *supra* notes 45-50, 77-90 and accompanying text.

466. 474 U.S. 481 (1986).

467. 113 S. Ct. 2462 (1993).

468. *Zobrest*, 113 S. Ct. at 2469 (1993); *Witters*, 474 U.S. at 489 (1986); see *supra* notes 96-104 and accompanying text.

469. *Zobrest*, 113 S. Ct. at 2464.



The IDEA creates a neutral government program dispensing aid not to schools but to individual handicapped children. If a handicapped child chooses to enroll in a sectarian school, we hold that the Establishment Clause does not prevent the school district from furnishing him with a sign-language interpreter there in order to facilitate his education.<sup>470</sup>

Finally, a majority of Justices in *Grumet* stated their willingness to reconsider *Aguilar*, and four Justices agreed to do the same with *Grand Rapids*.<sup>471</sup> Thus, the Court apparently remains willing to allow public employees to assist disabled students one-on-one in private religious schools if done under neutral, generally applicable aid schemes.<sup>472</sup> Further, the Court is most likely willing to overrule or limit the prohibition of public employees from conducting special education classes and performing special education services on private religious school premises.<sup>473</sup>

The Court, through *Witters*, *Zobrest*, and *Grumet*, has drawn a chart of how it will navigate between permissible government aid for disabled private religious school students and impermissible direct aid to religious schools.<sup>474</sup> *Witters* and *Zobrest* teach that disabled private religious school students may receive some kinds state educational assistance under the auspices of a state or federal aid schemes which apply to public and nonpublic students alike.<sup>475</sup> The *Grumet* Court, however, struck

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470. See Adams, *supra* note 101, at 1053-57 (suggesting that *Zobrest* signaled an accommodating turn in this area towards allowing aid to flow to religious school students as long as the aid went primarily to the student and not the religious institution).

471. Board of Educ. of Kiryas Joel Sch. Dist. v. Grumet, 114 S. Ct. 2481, 2498 (1994) (O'Connor, J., concurring), 2505 (Kennedy, J., concurring), 2515 (Scalia, J., concurring, joined by Chief Justice Rehnquist and Justice Thomas). While Justice O'Connor did not mention Board of Education of the City of Grand Rapids v. Ball, 473 U.S. 373 (1985), her reaffirmance of her disagreement with the result in *Aguilar v. Felton*, 473 U.S. at 402 (1985), indicates that she would also be willing to reconsider *Grand Rapids* because she dissented in part in that case for the reasons she laid out in her *Aguilar* dissent. *Grand Rapids*, 473 U.S. at 398-99.

472. See *Zobrest*, 113 S. Ct. at 2466; *Witters*, 474 U.S. at 489. *Zobrest's* potential effects on the role of government in private, namely religious, education has been both commended and criticized. For commendation, see Cacchillo, *supra* note 454, at 479 (noting that the decision represented a "victory for disabled children seeking education in a sectarian school"). For criticism, see Leading Cases, *State Aid to Parochial Schools*, 107 HARV. L. REV. 215, 224 (1993) (viewing *Zobrest* as "an exercise that dangerously opened the door for increased government involvement with religion").

473. "If *Aguilar* were overruled or abandoned, New York could return to its original strategy of providing remedial services to disabled Satmarer children on the premises of the religious academies in the village." Lupu, *supra* note 25, at 272.

474. While these cases give a strong indication of this course, the Court has not explicitly indicated that this will be its approach to analogous future cases. See McKinney, *supra* note 375, at 597-99.

475. It has further been suggested that "these cases . . . seem to support . . . the

down an attempt to provide such generally available services because the attempt amounted to an impermissible delegation of civic authority to a religious group.<sup>476</sup> At the same time, a majority of the Court expressed its willingness to overturn the precedent which lead to the New York legislature's conferral of civic authority to a religious group.<sup>477</sup> Hence *Grumet* created a boundary beyond which governments cannot reach to facilitate the provision of special education services. After *Grumet*, state and federal governments appear free to provide special education services to disabled students at neutral sites adjacent to private schools.<sup>478</sup> Furthermore, governments may send a public employee to assist a disabled student one-on-one,<sup>479</sup> and, in some instances, place public employees in the private religious school classroom itself to assist disabled students.<sup>480</sup> Governments cannot, however, enact measures applicable only to specific religious groups to facilitate that groups' receipt of special education services.<sup>481</sup> Thus, *Grumet* prohibits direct money grants to religious institutions and special measures to facilitate the ability of select groups to take advantage of generally applicable special education services. However, the Justices' call to reconsider *Aguilar* and *Grand Rapids*, when coupled with the holdings of *Witters*, *Zobrest*, and *Grumet*, indicates that the provision of vocational or personal special education

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proposition that a facially neutral statute offering general assistance without reference to religion will almost always survive an Establishment Clause attack." Sturtz, *supra* note 101, at 302-03. Overall, the Court's decisions regarding the provision of special education services to religious school students "indicate that direct instructional services may not be provided by a public entity on the premises of a sectarian school, but that some supportive services are permissible." Allan G. Osborne, Jr., *Providing Special Education and Related Services to Parochial School Students in the Wake of Zobrest*, 87 EDUC. L. REP. 329,329 (West 1994).

476. Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet, 114 S. Ct. 2481, 2487 (1994).

477. "It is the Court's insistence on disfavoring religion in *Aguilar* that led New York to favor it here." *Id.* at 2498 (O'Connor, J., concurring). "A neutral aid scheme, available to religious and nonreligious alike, is the preferable way to address problems such as the Satmar handicapped children have suffered." *Id.* at 2505 (Kennedy, J., concurring); see Lupu, *supra* note 25, at 272.

478. See *Grumet*, 114 S. Ct. at 2493; Underwood, *supra* note 25, at 62.

479. See *Zobrest v. Catalina Foothills Sch. Dist.*, 113 S. Ct. 2462 (1993); *Witters v. Washington Dep't of Servs. for the Blind*, 474 U.S. 481 (1986).

480. As Justice O'Connor stated in *Grumet*: "If the government provides this education on-site at public schools and at nonsectarian private schools, it is only fair that it provide it on-site at sectarian schools as well." 114 S. Ct. at 2498 (O'Connor, J., concurring).

481. *Id.* at 2481.

services via generally applicable statutes to both public and nonpublic school students is constitutional.

Thus, the Court appears willing to address the conflict between the IDEA (and its state counterparts) and the Establishment Clause and by molding precedent into a form that allows governments more flexibility in providing aid to disabled private religious school students.<sup>482</sup> The Court certainly will restrict the extent of the instruction and programs provided by the state on religious school premises to remain consistent with Establishment Clause precedent prohibiting direct state aid to religious groups.<sup>483</sup> The aid schemes must be neutral towards religion and applicable to all students, public and private, and the private religious schools must receive at most a slight, attenuated financial benefit from the aid program.<sup>484</sup> Because a majority of Justices called for *Aguilar's* reconsideration, *Grumet* indicates that the Court is willing to let government provide aid directly to disabled students, regardless of the religious denomination of the school they attend, and regardless of the fact that the aid may be provided much closer to home than previous cases indicated. Therefore, the conflict between state and federal funding of special education services for disabled students and the Establishment Clause appears somewhat diminished after *Grumet*.<sup>485</sup>

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482. See Sturtz, *supra* note 101, at 308 (stating that "the Establishment Clause barriers to public support for religion after *Zobrest* seem a bit lower"). The Court has yet to rule on whether the IDEA requires that services be provided at religious schools, but lower courts have addressed the issue and found that public districts may provide services on public campuses only. See *Goodall v. Stafford County Sch. Bd.*, 930 F.2d 363, 370 (4th Cir. 1991), *cert. denied*, 502 U.S. 864 (1991); Osborne, *supra* note 475, at 337-38. Furthermore, the Court has yet to directly address the effect of 34 C.F.R. § 76.532: "[A] Federal Department of Education regulation, which prohibits a school district from using Federal grant money to pay for 'religious worship, instruction or proselytization' or to pay for equipment used for religious worship, instruction or proselytization." McKinney, *supra* note 375, at 596 (quoting 34 C.F.R. § 76.532). The Court will be forced to confront these issues in the future "when parents ask for increased special education related services to be delivered on parochial school premises." *Id.* at 597.

483. In *Zobrest*, the Court pointed out that the facts that the IDEA does not prevent parents from freely selecting between private and public school for their children and that, under the IDEA, no public money goes to sectarian schools, were key to the program passing Establishment Clause muster. 113 S. Ct. at 2467-68. Thus the Court appears to remain committed to the principle that state aid may not go directly to religious groups. See McKinney, *supra* note 375, at 599. Justice Kennedy, in *Zobrest*, pointed out that even a neutral aid scheme would be limited by the Establishment Clause "insofar as it authorized the provision of teachers . . . [s]uch a program would not be saved simply because it supplied teachers to secular as well as sectarian schools." 113 S. Ct. at 2473.

484. See *Zobrest*, 113 S. Ct. at 2467-68; *Witters v. Washington Dep't of Servs. for the Blind*, 474 U.S. 481, 488-89 (1986).

485. Even after *Zobrest*, before the Court indicated its willingness to reconsider

## VI. CONCLUSION

There is "one constant in religious jurisprudence, which is the Court has conflicting precedent and is not yet prepared to agree on any of it."<sup>486</sup> *Board of Education of Kiryas Joel Village School District v. Grumet* is a spellbinding display of the United States Supreme Court's utter inability to clearly and consistently adjudicate Establishment Clause cases. To be sure, any area of constitutional law in which personal convictions play so large a role is bound to be permeated by complex cases in which the Justices struggle to agree.<sup>487</sup> But recent Establishment Clause decisions, *Grumet* being a prime example, evidence a persistent lack of consensus among the Justices on every level of analysis.

After *Grumet*, lower courts are left to pick up the pieces of the Court's Establishment Clause failures and struggle to discern the constitutionally correct outcome of future Establishment Clause disputes. In its duty to establish clear precedent for lower courts, then, the Court has failed.<sup>488</sup>

One positive aspect of the *Grumet* decision is its signal to disabled students attending private religious schools that the Court is increasingly willing to accommodate their special education needs. While the result in *Grumet* appears to disfavor these students, in the long run commentators might view this case as the point at which a majority of Justices realized that the Establishment Clause had gone too far in preventing neutral aid programs from reaching private religious school students. The Justices' call to reconsider *Aguilar* and *Grand Rapids* indicates that while Chapter 748 could not withstand scrutiny, the Monroe-Woodbury District's previous solution of providing the special education services at an annex to a Village private school, which was abandoned because of these deci-

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*Aguilar* and *Grand Rapids*, it was suggested that "the Court will resolve conflicts under the IDEA in favor of disabled children wherever possible." Cacchillo, *supra* note 454, at 479.

486. Robert H. Freilich et al., *The Supreme Court in Transition: Consensus Building or Ducking the Issues and Other Developments in Urban, State and Local Government Law*, 25 URB. LAW. 697, 724 (1993).

487. "People are bound to reach different conclusions as to what constitutes an establishment of religion even if the same terms are used to express that concept. In addition, one must accept that the concepts are dynamic; the constitution is a dynamic body of law." Underwood, *supra* note 25, at 102.

488. Even before the Court added its *Grumet* opinion to the confusion, the Court's recent Establishment Clause decisions "left the law in a state of confusion . . . and . . . have not been successful in clearing up any of the confusion." El-Sayed, *supra* note 147, at 476.

sions, now represents a constitutionally permissible accommodation of religion.

The “doctrinal gridlock”<sup>489</sup> that *Lemon* spawned and *Grumet* perpetuated must end. Justice O'Connor wisely called on the *Grumet* Court to step back from its myopic search for a single “Grand Unified Theory” for Establishment Clause cases and deal in a frank and principled manner with the diverse questions the Establishment Clause asks.<sup>490</sup> An approach that focuses directly on the nature of the Establishment Clause issues present in each case, instead of one that focuses on the whole of Establishment Clause jurisprudence at every turn, would likely produce a number of different tests, each with its own specific area of application. By adopting this kind of analysis, the Court would adopt a fresh and useful approach to this area of law and finally dispose of the sour fruit that has spoiled its Establishment Clause jurisprudence.

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489. James, *supra* note 407, at C4.

490. Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet, 114 S. Ct. 2481, 2498-99 (1994) (O'Connor, J., concurring).